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Commercial Law

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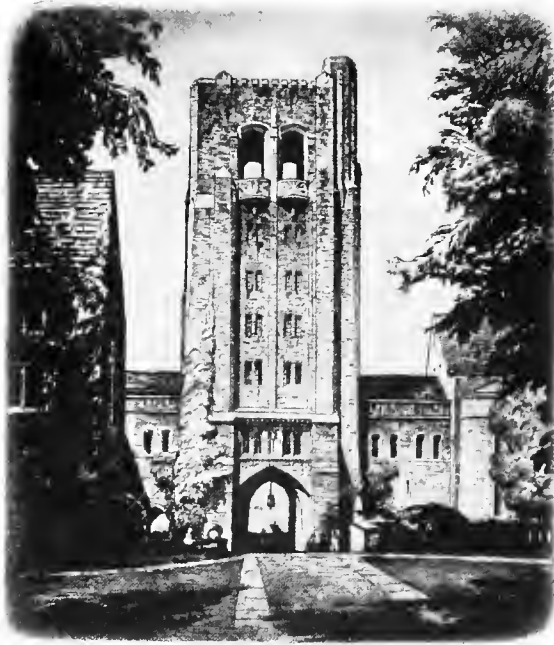
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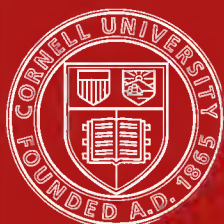
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# NEW COMMERCIAL LAW

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WILLIAMS & ROGERS  
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## PREFACE.

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The treatise on Commercial Law of which this work is a revision, was issued several years ago, in recognition of what appeared to its publishers a well defined demand. That the demand was real has been fully demonstrated by the wide adoption, large sale, and great popularity of the book.

While that work was prepared with great care and has given general satisfaction, its publishers have believed for some time that if certain changes in and additions to the text were made, the book would be of still greater value to both student and teacher. With this object constantly in mind the revision was made, and it is hoped and believed that the improvement sought has been accomplished.

The original plan of the work has not been materially changed. A number of the topics have been entirely re-written, and several new ones added. A change has been made in the order of the topics for the purpose of making the arrangement more systematic and logical. The language of the text throughout has been simplified, and the typographical arrangement improved. A new feature of the work, and one which it is thought will add greatly to its value, is the citation, in foot notes, of the statute laws of the various states and territories, which modify or annul the common law given in the text. These citations are very complete, and adapt the book for use in all parts of the United States.

It is hoped that the book in its new form will not only receive the approval of those for whom it was written—the commercial teachers and students of this country—but also aid in promoting the cause of Business Education.

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## CHAPTER I.

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### LAW IN GENERAL.

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**Definition.**—Law in its broadest sense is a rule of action. It conveys to our minds the idea of a command or order to act in a particular way, given by some power capable of compelling compliance or punishing disobedience. Law thus defined may be divided into three general classes, natural, moral, and human. Human law, with which alone we have to deal in this book, is any rule or set of rules prescribed by human beings for the government of themselves or others.

**Universality.**—It is only because of the existence and enforcement of rules of conduct that men can live together peaceably in society. It follows, therefore, that every state or nation has laws for the government of its citizens, controlling both their personal actions and their property. These laws are binding within the boundaries of the country where they are found and by which they are made, and strangers within the country must obey them the same as citizens; so all property within its borders is subject to the law of the land, no matter where its owner may reside. Outside a country, its laws generally have no effect. With reference to object, there are two general classes of human law, civil and criminal.

**Criminal Law** has for its object the prevention of acts which destroy the peace and harmony of society. If a person were allowed to kill his neighbor, to rob him of or destroy his property, to inflict bodily injury upon him, or do anything of like nature, the passions of men would keep society in a state of continual strife; the strong would live by preying upon the weak, and an advanced state of civilization would be impossible. Rules forbidding acts of this kind and providing for the punishment of those who violate them, we call criminal law.

**Civil Law** is composed of those rules which have for their object the enforcement of the less important rights of individuals against each other; those rights which are of interest principally to the individual, and do not have such an important bearing upon the welfare of society. For instance, if one man engages to work for another upon the condi-

tion that he is to be paid a certain sum of money upon completing the work, it is important only to these two, and to those depending upon them, that he be paid. Rules which have for their object the enforcement of such obligations as these, we call civil law.

**Sources of Law.**—In this country, the people constitute the supreme authority, and we must look to them collectively for the establishment of rules governing their conduct. We find that from time to time, by their duly constituted representatives, they have adopted constitutions—of the United States and of the separate states; they have enacted statutes—in Congress and the state legislatures; and they have given judicial decisions—by the United States and state courts. These acts, however, have not all originated law; some of them have simply declared the law already in existence. Leaving out of consideration the constitutions of the United States and the separate states, which are for the protection of the people against the encroachments of the government rather than for the protection of the people against each other, and the decisions of the courts, which have merely declared the law already in existence, we have, with reference to source, but two general classes of law in this country, common law and statute law.

**Common Law** is a term applied to that part of the law of England which was common to the whole country. It was at first merely a body of customs, but came, in time, to have the force of law, and was called the common law to distinguish it from those laws which applied only to a portion of the country. The common law is sometimes called the unwritten law, because, being originally merely a body of customs, it was for a long time not written. As soon as judges began to render their decisions in writing, the common law, being embodied in these decisions, became written, and is now to be found in thousands of volumes of reports containing the decisions of the courts of this country and England.

**Common Law in the United States.**—The English emigrants who settled this country being familiar with the common law, naturally continued to be governed by it on this side of the Atlantic; and the country having since been settled by descendants of these emigrants, the common law has been carried into all parts of the country.<sup>1</sup> We find that on many subjects there is a great similarity in the law of the different states, owing to the common law being its basis. A large part of the law known as commercial law, or the law of business transac-

<sup>1</sup> The state of Louisiana is an exception to this. That state was first settled by the Spaniards who brought with them the laws of their native country, instead of the common law. The law of Spain was founded on the Roman law, so that the basis of the law of Louisiana is Roman instead of English law.

tions, is common law, consequently a work on this subject is applicable to all the states.

**Statute Law.**—A statute is an act of a legislature. It is a law formally written out and passed by a legislative body, like the Congress of the United States or the legislature of a state. As a country develops, the old laws fail to meet the demands of the people and new ones are necessary. To supply this demand, each state has its legislature, which meets at regular intervals for the purpose of making such changes in the law and such new laws as, in its judgment, the state needs.

**National Law.**—There are some subjects, however, which are of general, rather than of local importance, and which concern all the states alike. For instance, the regulation of commerce with foreign nations and between the states; the maintenance of an army and navy; a post-office; and many other subjects of like nature are of interest to the whole United States and to no one state more than to another. For this reason, the people of the United States in adopting a constitution for the national government, conferred on the Congress of the United States sole power to pass laws on such subjects, and provided that the laws so passed should be of equal force in all the states. The laws thus passed by Congress and the state legislatures constitute what is known as statute law, and take the place of the common law whenever they come in conflict with it.

**Relative Authority.**—In a country which has so many different kinds of law as the United States, it is necessary that there be some rule as to which shall be the highest in authority. The constitution of the United States is a direct expression of the will of the whole people and is, therefore, the highest in authority. It provides that on those subjects which come within the province of the general government the laws of Congress shall be the law of the land, any law of a state to the contrary notwithstanding. All subjects not within the province of the general government are left within the control of the states, unless the United States' constitution expressly prohibits the states from passing any law on them. On subjects within the control of a state, its constitution, being the direct expression of the will of its people, is supreme; and next to this come the laws passed by its legislature. Underlying all these different kinds of law, most extensive by far, but least in authority, is the common law.

**Law and Property.**—In the early stages of society, laws are comparatively few, because there is little to regulate except personal intercourse, and only a small number of rules is necessary for this purpose. As soon, however, as the rights of property become recognized, and the kinds of property begin to multiply, the development of law is rapid.

With each new property right must come a law to uphold it. The greatest part of our law, therefore, is the law of property.

#### QUESTIONS.

Define law. Give its general divisions. Of which does this book treat? What is said of the universality of law? What are the divisions of human law? Define criminal law; civil law. What are the sources of our law? Define common law; statute law. What kinds of statute law have we? Define each. What is said of common law in the United States? In what respects is there similarity in the law of the different states? diversity? Give the relative authority of the different kinds of law. What is said of the relation of law and property?

## CHAPTER II.

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### CONTRACTS.

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**Definition.**—A contract is an agreement between two or more persons, based upon sufficient consideration, to do or not to do, some particular thing. It must be distinguished from a mere promise where there is only a statement on the part of one person, that he will do, or will not do some particular thing, without any obligation on the part of anyone else.

**Extent.**—Commercial law is simply the law of contracts; and its different branches, such as negotiable paper, bailments, agency, partnership, insurance, etc., are merely the different kinds of contracts that may be entered into. As every business transaction has for its foundation a contract, so all business law is built upon the law of contracts.

**Necessary Conditions.**—In order that there may be a valid contract, it is necessary that certain conditions be fulfilled. In the first place, there must be parties legally capable of making a binding contract; second, those parties must give their consent to the contract; third, there must be subject-matter, or something contracted about; and last, there must be a consideration, that is, an inducement for each party to enter into the contract. Each one of these conditions will form the subject for a subsequent chapter. Contracts may be divided into two general classes; contracts by specialty, and parol contracts.

**Specialty.**—A contract by specialty, or a “specialty” as it is briefly called, is a contract having a seal attached to it; the familiar examples are bonds, deeds, and mortgages. The seal now commonly used is a piece of colored or gilt paper, of any shape one may fancy, attached to the document immediately after the name of the person signing the same, though in many, in fact in most states, a simple mark or scroll printed or made with a pen with the intention of calling it a seal, is all that is required.

The earliest use of seals was on account of a lack of ability to write,

and they were consequently used alone at first; but as the ability to write became more general, it gradually grew into favor as a method of signifying assent. On account of the readiness and convenience with which a name can be written, and the inconvenience of using a seal, contracts of small importance came in time to be signed, the seal being omitted, while those of more importance were both signed and sealed. In this way has developed our custom of using the seal on conveyances of real estate, such as deeds and mortgages, and on bonds and other agreements involving important interests. The use of the seal will be discussed more at length in the chapter on real estate conveyances.

**Parol Contracts.**—A parol contract is any contract not under seal. As the great bulk of the world's business is controlled by this class of contracts, it is principally of them that we will treat in this work. A parol contract may be either written or oral.

**Written Contracts** are those in which the terms of agreement are written or printed on paper, or some other convenient material, and signed by the parties. The advantages of having a contract in writing are that the parties may know just how each understands the agreement, and that mistakes on account of a failure of either party to remember its exact terms may be prevented from arising. If the agreement is written down and preserved, any dispute can be immediately settled by reference to the writing.

**Oral Contracts** are those in which the agreement or understanding between the parties is arrived at by means of spoken words. Generally oral contracts are just as binding as written ones, the only difference being in the difficulty of proving them. There are, however, some exceptions to this. Certain contracts which will be discussed in a subsequent chapter, the law requires to be written, and these, of course, in order to be binding must be in writing. If, however, two contracts be made about the same subject matter, one written and the other oral, the written one must be followed. Where people take the trouble to write down an agreement, the law presumes generally that they mean just what they have written, on account of the deliberation with which it is done. If A enters into a written contract with B, agreeing to pay him a certain sum of money at a certain time, although they may have agreed orally at the time of making the contract that it is to be paid in work, or is not to be paid at all, excepting under certain conditions, A will not be allowed to give evidence of this oral agreement, but will be compelled to pay in money, without regard to conditions. Oral contracts may be divided into express contracts and implied contracts.

**Express Contracts** are those in which the terms are expressly agreed upon and stated, and each party expressly agrees to perform his

part of the contract. For example, one man hires out to work for another for one year at twenty dollars per month and his board. The terms of the contract are that one man shall work for the other for a certain time, at a certain kind of work, which he expressly agrees to do, and that the other shall pay him twenty dollars per month and board him, which he expressly agrees to do.

**Implied Contracts** are those in which the proposition or acceptance has not been given in words, but is left to be implied by some acts of the parties. A man goes into a store and asks the clerk for ten pounds of sugar; the clerk wraps up the sugar and the man walks away with it, saying nothing about payment. He has not expressly agreed to pay for the sugar, but his accepting and going away with it implies a promise on his part to pay the usual price, and he will be compelled to fulfill this implied agreement just the same as if he had expressly agreed to pay for the sugar. In general we may say, that where one person does something at the request of another, there is an implied promise to pay its reasonable value, unless it is understood by both that no pay is expected.

**Frequency of Implied Contracts.**—In business very many of the contracts involving minor matters have one or more of their stipulations implied. In fact there may be said to be an implied agreement in every express contract, that the parties will do whatever the law requires of them, in carrying out the terms and fulfilling the conditions that are expressed.

**Executed and Executory Contracts.**—An executed contract is one in which the thing agreed upon has been done; when it has not been done it is executory. If one party has performed his part but the other has not, it is executed on one side and executory on the other. When a contract has been executed, it really ceases to be a contract, and simply signifies rights acquired by contract. This division into executed and executory is important, because when we come to treat of contracts that are not binding, we shall find that many which cannot be enforced while executory become binding on the parties when executed, and cannot then be rescinded.

**Entire and Divisible.**—An entire contract is one in which an entire performance on the part of one party must precede performance by the other. A makes a contract with B to erect a house for him according to certain plans and specifications, and is to receive therefor a certain sum, when completed. This is an entire contract, and the house must be completed according to agreement before any pay can be collected. If A should partly finish the house and then leave it, he could recover nothing for his work.

Divisible contracts are those in which complete performance by one party is not necessary before anything can be required of the other. A agrees to sell B twenty-five tons of hay at six dollars per ton. This is divisible, unless there is some special agreement to the contrary, and if for some cause or other only ten tons are delivered, payment for this amount can be enforced. There is a strong tendency on the part of the courts in most states to consider all contracts divisible where it can be done without injury to the parties. In such cases the party is allowed compensation to the full value of what he has done, but is made to pay whatever damages may have resulted from his partial failure.

#### QUESTIONS.

Define contract. What is said of the extent of the law of contracts? State the necessary conditions of a valid contract. What are the general classes of contracts? Define specialty; seal. What is the object of using seals? Define parol contract; give divisions. Define written; oral. Give advantages of each. Give division of oral; define each. Give examples. What can you say of the frequency of implied contracts? Define executed contract; executory; entire; divisible. Give examples of each.

## CHAPTER III.

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### PARTIES.

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**Competent.**—Generally speaking, all persons may bind themselves by contract in any manner they please. The law presumes that they are able to judge for themselves about the kind of contracts they wish to make, and the terms of them. There are, however, some exceptions to this rule, both as to the persons who may enter into a contract, and the subjects about which they may contract. As we shall see in a subsequent chapter, there are certain subjects about which all persons are forbidden to make contracts; and as we shall see in this chapter, there are certain persons who are forbidden to make contracts for the reason that the law considers them unable to judge of their own wants. With reference to parties, the rule then is that all persons, except those who are forbidden, can make contracts to suit themselves, about any legal subject.

**Void and Voidable.**—Contracts made by incompetent persons are regarded in law in two ways: they may be either void or voidable. A void contract is one which is absolutely of no effect from the beginning, and under which no one can acquire any rights. It cannot be enforced by either party. A voidable contract is one that is binding at the time it is made, but may be declared by one of the parties not binding on himself, and is then not binding upon either. Usually, in the case of voidable contracts, only one party has the right to declare it of no effect, it being binding on the other until so rescinded.

**Incompetent.**—Those declared by law to be incompetent are insane persons, idiots, drunkards, married women, and alien enemies.

**Insane.**—All persons born with ordinary mental capacity who have, through disease or otherwise, lost the use of the reasoning faculty, are insane. This class includes all grades, from those who are violent and dangerous to those who are simply unsound in some particular direction, or on some particular subject, having ordinary mental capacity on all others. The terms lunacy and insanity are used frequently as meaning

the same thing, but, strictly speaking, a lunatic is an insane person who has rational intervals.

The general rule as to the competency of this class of persons is that the contracts of an insane person are not binding upon him. This must be taken with several qualifications. A person insane in some particular direction and rational in all others, will be bound by a contract made by him on a subject not affected by his insanity. A lunatic will be bound by a contract made during a rational or lucid interval. Of course, in order to avoid a contract on the ground of insanity, the fact that the person was insane when he made it must be proved like any other fact. In most states provision is made for what are called inquisitions of lunacy. In such cases when a person is supposed to be insane, application is made to the judge of the proper court for a trial to determine his sanity or insanity. If it is decided that he is insane, a guardian is appointed to look after him and his affairs, and after that all contracts made by him, without the guardian's consent, are absolutely void.

**Idiots** are those who are born with such a deficiency of mental capacity that they are incapable of receiving education, and on account of this deficiency never acquire ordinary understanding or judgment. Lacking the capacity to carry on the business which is necessary for support, an idiot is placed under charge of a guardian, who is to look after all his affairs, and see that he does not want for the common comforts of life. This guardian will usually be the parent of the idiot, but if his parents are both dead, a guardian will be appointed, usually by the probate judge of the county in which he lives. The fact that the person is an idiot is established by an inquisition in the same way as insanity. The rule as to competency which we applied to insanity will apply to idiocy. An idiot's contracts are generally not binding upon him.

**Drunkards.**—Drunkenness is a kind of temporary insanity, and most of the law of insanity regarding competency applies to it. A contract made by a person in a state of intoxication is generally not binding upon him. The person seeking to avoid a contract on the ground of intoxication must show that, at the time the contract was made, he was so intoxicated as to be deprived of the use of reason. Partial intoxication is not sufficient, though it will frequently be evidence of fraud, and may lead to the avoidance of the contract on that ground. A person wishing to escape from the terms of a contract on the ground of intoxication, must rescind the contract within a reasonable time after becoming sober. Where a person has become intoxicated for the purpose of practicing fraud by entering into a contract afterwards to be avoided, the law will not allow him to take advantage

of his intoxication. In some states provision is made that in case a person habitually becomes intoxicated, he can be tried in the same way as a person who is supposed to be insane, and declared an habitual drunkard. Where this is done a guardian is appointed, and after that all contracts made by the drunkard without the consent of the guardian are void, whether at the time of making them he was actually intoxicated or not.

**Infants.**—Infants are commonly understood to be those who are under seven years of age, but in the sense of the law all who have not reached the age of majority—all minors—are infants. By the common law, majority for both sexes was twenty-one years. Of course it is not presumed that the arrival of a person at the age of twenty-one years effects any great change in his mental capacity, but it is known that young persons are not capable of judging for themselves in the common affairs of life, and some period must be fixed which may be said to be the age at which people generally arrive at the age of discretion. Twenty-one has been thought to come the nearest to applying to all cases, and has accordingly been adopted in this country as the age of majority.<sup>1</sup> The statutes of a few states have changed this in the case of females so that they become of age at eighteen<sup>2</sup> or at marriage.<sup>3</sup> The minor becomes of age on the day preceding his twenty-first birthday.<sup>4</sup> Since an infant is not presumed capable of attending to business affairs, his contracts, like those of the classes before spoken of, are generally not binding upon him.

**Disaffirmance** is a refusal to be bound by the terms of a voidable contract. It can be given by a person who was incompetent at the time the contract was made, and while it is usually given by the incompetent party, when the other seeks to enforce performance of the contract, it may be given at any other time.<sup>5</sup> When a contract is dis-

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<sup>1</sup> In Kansas, Arkansas, Texas, Alabama, Mississippi, Louisiana, and perhaps in a few others, the statutes allow a minor under certain circumstances to obtain a decree of court rendering him of age for all purposes of property and contract.

<sup>2</sup> This is so in the following states: Vermont, Ohio, Illinois, Iowa, Minnesota, Kansas, Nebraska, Maryland, Missouri, Arkansas, California, Colorado, Oregon, Nevada, Washington. N. Dakota, S. Dakota, and Idaho.

<sup>3</sup> So in Oregon, Maryland, Texas, Washington, if her husband is of full age, and Maine. In Nebraska if she is over sixteen she attains her majority on marriage. In Iowa, Texas, and Louisiana all minors, male and female, attain their majority on marriage.

<sup>4</sup> In California and New York, a minor is not of age until his twenty-first birthday.

<sup>5</sup> In Kansas and Iowa an infant must disaffirm within a reasonable time after reaching majority or he cannot do so at all. A failure to so disaffirm in those states amounts to a ratification.

affirmed, it becomes wholly void from that time, and the party disaffirming it is entitled to recover whatever he has paid, but must return anything he has received.

**Ratification** is agreeing to be bound by the terms of a voidable agreement. It of course can only be given after the incompetency which made the contract voidable is removed; in case of an infant, after attaining majority; in case of a lunatic or drunkard, after he becomes possessed of the use of his reason. Ratification may be by express promise to be bound by the terms of the contract,<sup>1</sup> or by showing an intention to retain its advantages. Thus, if a person, after attaining majority, keeps property bought before majority, and makes no offer to return it, he will be presumed to have ratified the contract by which he obtained it.

**Contracts for Necessaries.**—To the foregoing rules regarding voidable contracts, there is an exception where they are made for the purpose of obtaining the necessities of life. Contracts for the necessities of life, made by incompetent persons, are binding on them the same as though they were competent, with the qualification, that if they have agreed to pay an unreasonable price, they can only be compelled to pay what the goods are reasonably worth. The rule which makes voidable the contracts of the persons mentioned above, is for the purpose of protecting those who lack ordinary mental ability, and this exception is for the same purpose. If it were not for this exception a minor with plenty of property might suffer from actual want, because no one would furnish him necessities for fear of not being paid. As it is, necessities can be furnished him, and he is amply protected by the rule that he can be made to pay only what the goods are reasonably worth.

By necessities of life are meant not only those things which are absolutely necessary to support life, but whatever is proper for the person's station in life. Just what are necessities must be determined by the circumstances of each particular case; what would be necessities for one person would be luxuries for another. Among necessities for all persons are included proper food, clothing, lodging, and a common school education.

**Married Women.**—At common law, a married woman was said to have no legal existence, her identity being merged in that of her hus-

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<sup>1</sup> In the following states a ratification in order to be binding must be an express promise in writing and signed by the party ratifying it: Maine, New Jersey, Virginia, West Virginia, Kentucky, Missouri, Arkansas, South Carolina, and Mississippi.

band. All her personal property at marriage became his, and he became responsible for her debts; she was consequently unable to enter into any mercantile contracts, it being presumed that all her wants would be provided for by her husband. This old idea has been to a large extent abandoned, until now a great many of the states have passed laws giving married women the right to control their separate property, and make contracts concerning it.<sup>1</sup> In all the states where these privileges have not been granted, there has been some modification of the common law in her favor, showing that the tendency is toward liberality in this respect.

**Alien Enemies.**—Subjects of a country with which our country is at war, are called alien enemies, and contracts made with an alien enemy are void. All traffic with an enemy during war is forbidden, because if it were allowed there might result a diversity of interests between a government and its subjects. A manufacturer in one country might be making large sums of money, by furnishing a merchant in the other country with the products of his factory, the demand for which had been created by the war, and would cease with its close. Manifestly, then, the interests of the manufacturer would be promoted by a continuation of hostilities, and might lead him not only to refuse aid to his own government, but actually to assist the enemy. This principle of law is of no effect except in time of war.

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<sup>1</sup> In the following states and territories a married woman owns her separate property and can make contracts concerning it the same as if unmarried: Arizona, Arkansas, California, Colorado, North Dakota, South Dakota, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Carolina, Utah, Virginia, Washington, Wisconsin, Wyoming. In Vermont if she is engaged in separate business. In Alabama with husband's consent in writing. In several of these states some qualifications of this rule will be found which must be determined by reference to the statutes.

### QUESTIONS.

Who are competent to contract? Distinguish between void and voidable. Who are incompetent to contract? What is an insane person? Distinguish between insanity and lunacy. Give the rule as to the competency of an insane person. How is insanity determined? Define idiot. Give rule as to competency. Define drunkard. Give rule as to competency. What must be shown in order to avoid a contract on the ground of intoxication? Define habitual drunkard. Define infant; majority. What differences exist in the different states as to the age

of majority? Give the rule as to the competency of an infant. Define disaffirmance. By whom can it be given? when? Define ratification. By whom can it be given? when? how? Are there any exceptions to the foregoing rules regarding competency? Give reason. What are necessities? Give the old rule as to the competency of married women? How has this been modified in this country? Define alien enemy. Give rule as to competency. Give reason for this rule.

## CHAPTER IV.

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### CONSENT.

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**Definition.**—As we have seen, one of the essential elements of every binding contract is mutual assent or consent; that is, the parties must agree to the same thing, in the same sense. Until they have thus agreed, there can be no contract. Consent may be divided into two elements, proposition and acceptance.

**Proposition.**—A proposition is the offer to make a contract. It can be divided into two elements, a request, and an inducement held out to the other party to comply with the request. For example, A asks B to sell him his horse for one hundred dollars; that is, he requests B to let him have his horse, and as an inducement for him to comply with the request, says he will give him one hundred dollars. These two elements constitute a proposition. A proposition may be oral or written, and in either case may be conditional or general.

**Acceptance** is agreeing to comply with the terms of a proposition, and may be given orally or in writing. A proposition, as we have seen, is merely an offer to make a contract; but, when the acceptance has been given, it becomes binding on both parties; the minds have met and the contract is complete. It is not necessary, however, that the acceptance of an offer be expressly given. It may be, and as a matter of fact frequently is, implied from acts or circumstances. The acceptance, however, in order to make a binding contract, must be unconditional. For example, A offers to sell B a horse for one hundred dollars, and B agrees to accept the offer, provided he be allowed one year in which to pay the money; this would be a conditional acceptance, and in effect is merely a new proposition, which A can accept or reject as he pleases.

**Oral Proposition.**—An oral proposition is made by means of spoken words. It is usually made with the expectation that it will be accepted at the time and place where it is made, and must be accepted at that time and place in order to bind the proposer, unless time is given in which to accept. Where nothing is said to the contrary, it is understood that an oral proposition remains open only a very short time, and unless accepted immediately is considered to be withdrawn. Generally

it must be accepted before the parties separate, in order to make a contract. If time is given in which to accept, it may be accepted within that time, but even if time is given, unless the proposer is paid for keeping the offer open, he may withdraw it at any time before acceptance, whether the time has expired or not.

**Written Propositions** are usually made by mail or telegraph, or by a formal written contract drawn up to be signed by both parties. In most cases of written contracts, the contract and consequently the proposition is made orally first, and the written instrument is simply a written statement of the agreement. Where the offer is made by letter, some time must necessarily elapse before it can be accepted, and the offer in the mean time continues open for days or weeks, but the moment the letter of acceptance is mailed, the contract is complete. Hence it would seem to follow that, even if the letter is lost or destroyed after it is mailed, and so not received, yet the contract has been completed, and the parties are bound. Whether this is true or not depends upon the circumstances, and can only be determined in view of the facts of each case.

**Illustration.**—A grain factor at Chicago writes to a miller in Rochester on the tenth day of January, offering to sell him five thousand bushels of wheat at eighty-seven cents per bushel. The miller receives the offer January 12th, and on the evening of the same day mails a letter containing his acceptance, post-paid and properly addressed to the factor in Chicago. From that moment the contract is binding. On the 11th of January the factor, concluding that he does not care to sell the wheat at that price, writes and mails to the miller another letter withdrawing his offer of the day before. This letter was written and mailed twenty-four hours before the offer was actually accepted, but it does not release the factor, because it was not received until after the offer was accepted. In such cases the person receiving the offer has a right to presume that it is continuing until he is actually notified of its withdrawal. The factor might have telegraphed his withdrawal, and thus prevented acceptance.

**Conditional Proposition.**—A proposition may have any condition attached to it that pleases the proposer, and in order to make a contract, the acceptance must be in accordance with the condition. For instance, the proposer may specify that the acceptance must be in writing, sealed or unsealed, within a specified time, at a certain place, etc., and an acceptance must be in the way specified.

**General Proposition.**—A proposition may be made general, that is, to no particular person but to all persons, and a contract will be made by the acceptance of any one. For example, an auctioneer may

put up an article agreeing to sell it at a certain price. The sale is complete as soon as some one accepts the offer and agrees to give this price. A reward may be offered for finding and returning a lost article, or for the arrest and conviction of a criminal, and any one on performing the required act is entitled to the reward.

**What Assent Implies.**—When assent is given to a contract, it implies that the parties have understood the terms of the agreement and that they have voluntarily given their consent to them. Consequently where they have not understood the terms of the agreement, or where the consent has not been freely given, there has not been the assent which the law requires, and there is no contract. Examples of failure to comply with these conditions are assenting to a contract under duress, through fraud, and mistake.

**Duress** is some threat or danger of physical harm or unlawful arrest, used with a view of compelling assent to a contract. A contract made under duress is voidable, and may be rescinded by the party who has thus given assent. In order to constitute duress, there must be, or appear to be, actual danger of bodily harm or unlawful arrest. If the arrest which is threatened is merely a threat of lawful prosecution, or the threatened injury is merely to property, it will not constitute duress.

**Fraud** is any deception or misrepresentation used with the intention of securing assent to an agreement, when such assent would not otherwise be given. Fraud may operate to induce assent in several ways. The misrepresentation may be such as to make the acceptor think the terms of the contract are different from what they really are; that is, he may sign an instrument under the impression that it says one thing, when in fact it says another. Again, it may be such as to make the party believe the effect of the contract is different from what it really is. He has, in fact, assented to the contract as it really is, but under a misapprehension as to its effect.

Fraud, whatever be its nature, vitiates the contract, and leaves the defrauded party at liberty to rescind the agreement. The contract is not absolutely void but only voidable. The party who has been defrauded may rescind the contract if he chooses, or he may treat it as valid, and hold the other strictly to the performance of his part of the agreement. This is an advantage which the law gives to the innocent party; but if he wishes to declare the contract not binding, he must do so promptly, or he will be presumed to have assented to it. The fraud must be such as to actually deceive the party, in order to make the contract voidable. If he sees the fraud but accepts, notwithstanding it, he cannot rescind the contract. So he must use the diligence to

avoid deception that would naturally be expected under the circumstances, or he cannot take advantage of the fraud to rescind the contract. If a person allows himself to be cheated through his own negligence, the law will not come to his assistance.

**Mistake.** — The law does not allow much latitude for mistakes, though where a contract is based upon a mutual mistake, it is not binding. The mistake must be mutual; a mistake of one party not known to the other, and not made by the other, will not prevent the enforcement of the contract. For instance, I buy a watch of a jeweler supposing it to be silver, but say nothing to him about it. He sells it to me knowing it is nickel and not knowing that I think it is silver. The fact that I was mistaken about the watch will be no ground for the rescision of the contract, unless the jeweler did or said something with the intention of misleading me as to its real value. If the jeweler also supposed the watch to be silver, and sold it to me as such, this would be a mutual mistake; that is, made by both parties, and would make the contract void. It frequently happens that, through a mistake in the use of language, parties in entering into a written contract do not say in the contract what they intended. In such cases the courts will sometimes change the contract to mean what both parties supposed it to mean, if it can be clearly proved that its meaning is not what they intended. If the intention of the parties cannot be ascertained with certainty, the contract will not be changed, but will be declared void because of mutual mistake.

### QUESTIONS.

Define consent. Of what elements is it composed? Define proposition. Of what elements is it composed? Give example. In what ways may a proposition be made? Define acceptance. How may it be given? Define oral proposition. What is said of the acceptance of an oral proposition? withdrawal? Define written proposition. How are they usually made? What is said of their acceptance? Give example. Define conditional proposition. What is said of its acceptance? What is a general proposition? What is said of its acceptance? What does assent to a contract imply? Give examples of failure to fulfill these conditions. Define duress. Give its effect. Define fraud. In what way may it influence a party to assent to a contract? Give its effect. What is the effect of a mistake in making a contract? Define mutual mistake. How may it sometimes be rectified?

## CHAPTER V.

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### CONSIDERATION.

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**Nature and Necessity.**—The consideration is the reason or inducement on which the parties consent to be bound by contract. As we have seen, a proposition consists of two parts, a request and an inducement held out to the party to whom it is made, to comply with the request. This inducement, whatever it may be, is the consideration. We cannot, however, always refer to one part of a contract as the consideration. Which part is the consideration depends on how the contract is regarded, since each part is the consideration for the other. A agrees to sell B a horse for one hundred dollars. The consideration for A's promise is the receiving of the money, and the consideration for B's promise is the receiving of the horse.

It is an ancient and well established rule of law that no promise can be enforced unless it rests upon a consideration. There are, however, two exceptions to this rule; one is in the case of sealed instruments, which are said to import a consideration, that is none need be proved; the other exception is in the case of negotiable paper in the hands of an innocent purchaser. Consideration is sometimes divided into two general classes, good and valuable.

**Good Consideration** consists in natural love and affection existing between relatives. A father may be induced by affection for his son to present him a team of horses, or anything else of value, and this affection which induces him to make the present is said to be a good consideration, because it will support the promise. Such a consideration, however, will only support a promise after it has been executed. The son can hold the property after he has received it; but if after the promise is made, the father decides he does not want to fulfill it, the son cannot compel performance. Even in an executed contract such a consideration is not sufficient when the rights of third parties are concerned. If the father was in failing financial circumstances when he gave the property to his son, his creditors could interfere, have the conveyance set aside and the property sold to satisfy their claims.

**Valuable Consideration.**—A valuable consideration is an inducement of value, and may be a benefit to the promissor, or a loss or incon-

venience to the promisee. A agrees to give B a horse owned by him in consideration of receiving one hundred dollars; this one hundred dollars is a valuable consideration which is a benefit to the promisor. If A should agree to give B the horse if he would give the one hundred dollars to C, this would be a valuable consideration, and a detriment to the promisee. As a matter of fact, nearly all considerations belong to both of the classes. Persons do not generally enter into an obligation without receiving some benefit in return, nor do they usually receive a benefit without the other party sustaining a corresponding loss, consequently valuable considerations are usually a benefit to the promisor, and a loss to the promisee.

**Adequacy.**—It is not to be understood that the obligation entered into, or the thing performed by one party, must be equal to the consideration which he receives for it. A consideration is sufficient if it be a substantial one; that is one possessing some value, although it may not be adequate. The law presumes that each party is able to determine for himself whether he is receiving an equivalent for what he gives, consequently unless there is evidence of fraud, the contract will be supported if he has received anything.

**Accord and Satisfaction** is a compromise settlement of a disputed claim, or a settlement by giving something else than what was agreed upon when the contract was made. Where there is a genuine controversy as to the amount of a debt, the payment of part of what is claimed by the creditor is a consideration for the release of the balance. Unless there is a dispute about the amount of the debt, a payment of a part is not a consideration for a release or extension of the time of payment of the remainder, since in paying a part the debtor has done only what he is bound to do, and the agreement is without consideration. If, however, the part is paid before it is due, this will be a sufficient consideration for extension of time or release of the remainder. So, also, giving additional security for a debt before it is due, is sufficient consideration for an extension of the time of payment.

**Mutual Promises.**—A promise may be a consideration for a promise; but in order that one promise support the other it is necessary that they both be made at the same time. A promise made to-day would not be a sufficient consideration for one made yesterday, unless yesterday's promise be renewed. The principle that one promise is a consideration for another is, in popular ideas, sometimes applied to subscription papers, all who sign them being regarded as held on the ground that each promise is a consideration for the others. This, however, is not strictly true. A promise of a voluntary contribution is not usually binding unless something is paid for it. If the paper be signed with

the understanding that the money is to be paid in case a certain amount is raised, the promise becomes binding when that amount is subscribed.

**Insufficient Consideration.**—Every promise or obligation which serves as an inducement is not a sufficient consideration to uphold a contract. There are several kinds of inducements which will not serve as a consideration, but the most important of these are those which are illegal, impossible, and moral obligations.

**Illegal.**—A promise to do, or the doing of, an act which is illegal, is not a sufficient consideration to support the promise of another. A note given to pay for suppressing a criminal prosecution, or for the violation of a law, or for defrauding a person, or for the commission of any act contrary to law, is void for want of a sufficient consideration.

**Impossible.**—So a promise to do an act which is in its very nature wholly impossible, is not a sufficient consideration to support a contract. The impossibility must be apparent, however, and in the nature of the promise itself. A mere pecuniary impossibility, owing to a lack of funds, is not a legal impossibility. So if the impossibility has arisen by reason of the fault of the promisor, or if it was an impossibility that might have been readily foreseen, it will not relieve him.

**Moral Obligation.**—A purely moral obligation is not a sufficient consideration to support a contract. A son in good circumstances is morally bound to support an indigent parent, but a promise made by the son to pay for articles already furnished to the parent by another is not binding for want of consideration. But if the articles were furnished at the son's request, made before they were furnished, his promise to pay for them becomes binding; and his promise, if not made expressly, will be implied from the request.

**Executed Consideration.**—Where a benefit has been enjoyed, or a loss or inconvenience suffered, and in consideration of it a promise to do or pay something is afterwards made, such benefit, loss, or inconvenience is termed an executed consideration; that is, it has been executed or finished before the promise is made. Such a consideration is not sufficient to support a promise. A physician treats a patient who is very poor. Afterwards some benevolent person learns the fact and agrees to pay the physician for his services, but the promise is not binding for want of a sufficient consideration. If, however, the services had been rendered at the request of the person making the promise, his subsequent promise would bind him. This previous request will be presumed where the person promising has derived a personal benefit from such past consideration. A performs some work for B in the absence

of B and without his knowledge; B afterwards accepts the benefits of the work and promises to pay for it; this promise will bind him.

**Failure of Consideration.**—Where a consideration apparently valuable and sufficient turns out to be nothing, or a consideration originally sufficient becomes wholly valueless before part performance on either side, there is said to be a failure of consideration. Where the consideration totally fails, the contract is void. Thus a note given to make and sell a patented machine, becomes void in the hands of the original holder if the patent turns out to be void. If the failure is only partial, leaving a substantial though less valuable consideration, this may be sufficient to support the contract; but if the contract is divisible, the party who has lost by the failure can have a proportionate reduction in his promise, or in the amount he has to pay.

#### QUESTIONS.

Define consideration. Where is it necessary? What kinds are there? Define good consideration. Where is it sufficient? Where insufficient? Define valuable consideration. What may it be? What is said of the adequacy of consideration? What is said of accord and satisfaction as a consideration? Give examples. Give the rule regarding promises as a consideration. When sufficient? Give the rule regarding subscription papers. What can you say of insufficient consideration? illegal? impossible? moral obligation? Give examples. Give effect of previous request on moral obligation. Define executed consideration. Give example. What can you say of its sufficiency? What is failure of consideration? Give its effect.

## CHAPTER VI.

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### SUBJECT MATTER.

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**Definition.**—The fourth condition of a valid contract is subject matter; that is, there must be something definite which forms the subject of the agreement, something to be done or left undone. This, whatever it may be, is the subject matter of the contract.

**Legality.**—The rule applied to the competency of parties can be applied to the legality of subject matter. Anything may be legally the subject matter of a contract *which the law does not forbid*. Therefore, if we wish to know whether a particular subject matter is legal, we must look, not to see if it is allowed, but if it is forbidden.

**Illegality.**—Contracts on subjects which the law says shall not be the subject matter of a contract are absolutely void, and cannot be enforced by either party. This rule, however, applies only to executory contracts. If a contract with illegal subject matter is voluntarily executed, it is the same as though the contract had been originally good. The law will not compel the return of anything paid under such a contract any more than it will compel performance. In case the contract is only partially executed, the party whose part is still executory may refuse both to execute his part of the agreement and to refund what he has received. There are three general classes of contracts that are void on account of illegal subject matter, viz: those which are against public policy, immoral, and fraudulent.

**Against Public Policy.**—All contracts which, if enforced, would be contrary to the good of the public or opposed to the welfare of the community, are said to be against public policy, and are therefore void. A large number of contracts come under this head, but the principal subdivisions are those in restraint of trade, in restraint of marriage, perverse of the acts of government, and obstructive to the course of justice.

**In Restraint of Trade.**—An agreement not to carry on a particular trade or business, which is lawful or beneficial to the community and the individual, is void because its enforcement would be against public policy. A contract upon sufficient consideration in partial restraint of trade may be valid, as where one agrees not to carry on a

particular trade or business in a certain locality; but an agreement not to carry on any business, or a particular business anywhere, is illegal and void. The rule then is that a reasonable restraint may be legal while an unreasonable restraint is always void. Just what restraint is reasonable is a question for the court to decide in view of the circumstances of each particular case.

Contracts in partial restraint of trade usually arise in the sale of what is known as the good will of a business. Where a business is well established there is a likelihood that the old customers will continue to patronize the place, no matter who owns it, and this likelihood is called the good-will. Where one buys a business it is frequently stipulated that the party selling shall not engage again in the same business in the same place, in order that the purchaser may secure the trade of the old customers. This is called the sale of the good-will, and is valid although it is in partial restraint of trade, because it is not unreasonable.

**In Restraint of Marriage.**—The same rule applies to contracts, the object of which is to prevent marriage, as to those in restraint of trade. A reasonable restraint is allowable, but an unreasonable one is not. Not only is a contract not to marry for an unreasonable time void, but where a will is made granting money or property to a person on condition that he remains unmarried for an unreasonable length of time, the restriction is void and the legacy is taken without it. What is a reasonable restraint must be decided by the court, according to the circumstances of each particular case.

As refraining from marriage is opposed to public policy, so are hasty and ill-advised marriages; consequently what are called marriage brokerage contracts, contracts for the payment of money or other compensation for procuring a marriage, are void. Nor is it necessary in order to make such a contract void, that the marriage procured be actually ill-advised and unsuitable; it is void without regard to the propriety of the marriage.

**Pervasive of the Acts of Government.**—The proper exercise of the powers of government is for the public good, consequently any agreement intended to prevent the proper application of such powers is void as being against public policy. Such are all contracts to pay for services rendered in securing election to a public office; contracts with a private person to influence the acts of a public officer by addressing to him other than public considerations; also, contracts for services as a lobbyist in favor of or against a bill before a legislature. Of course this does not include contracts to pay for openly presenting facts or making appeals to an officer in the regular course of his business, such as hiring a lawyer to appear before a court or at an appointed hearing

before a legislative committee, but it simply refers to influence used privately and outside of official hours.

**Obstructive to the Course of Justice.**—All contracts, the purpose of which is to obstruct the course of justice, are void as being against public policy. Thus an agreement not to prosecute a thief if the stolen goods are returned, is void as obstructing the course of justice. The same is true of contracts to abstain from testifying as a witness in a suit; to procure witnesses to swear to a particular thing; or to pay a witness more if one party succeeds than if he does not.

**Immoral.**—The second class of contracts which have illegal subject matter is that which has an immoral tendency. Any contract to do an immoral act, or to do that which will be prejudicial to the morals of the community, is void. The principal contracts which come under the head of immoral, are those relating to obscene publications, Sunday desecration, and bets or wagers.

**Obscene Publications** have a tendency to corrupt the morals of a people, consequently a contract for the publication of books, pictures, etc., coming under this head is void. In many states special laws have been enacted for the suppression of such publications, making the act of publication a punishable offense.

**Sunday Desecration.**—Statutes have been adopted in all the states prohibiting worldly business on the Sabbath, and all contracts for the performance of labor, or any other act which the statute forbids, are void. Such contracts are not void at common law, consequently whether a contract for the performance of a particular act on Sunday is void, can only be determined by reference to the statutes of the state in which it is to be performed. This refers to contracts made on a week day to be executed on Sunday, but in some states the statutes forbid entering into a contract on Sunday; and where this is true, any contract made on Sunday, no matter what its subject matter, is void.

**Bets or Wagers.**—At the common law, all bets or wagers, the tendency of which is contrary to public policy, or to the corruption of morals, such as on the result of an election or a judicial trial, a prize fight, etc., were illegal and void. Money placed in the hands of a stakeholder in such cases could be recovered at any time before payment, but not afterwards. In many states all betting and gaming are prohibited by statute; so also are lotteries and raffles. Where such is the case, all contracts founded on a wager, or lottery, or any chance, or uncertain event are void. In some cases money paid on such a contract can be recovered. Reference must be had to the statutes to determine the law of each state. Where there is no statutory provision, only those wagers

are void which have an immoral tendency, or a tendency contrary to public policy, as at common law.

**Fraudulent.**—The third class of contracts void because of illegal subject matter, is where the purpose is fraudulent, that is to defraud a third person. The cases of contracts for the purpose of defrauding third parties, occur most frequently in contracts relating to insolvent laws, auction sales, and assignments.

**Insolvent Laws.**—In some states it is provided by statute that where a person has more debts than he has property or means to pay, he can pay each creditor a certain portion of his claim and be discharged from all further liability. In some cases it is provided that he can do this only with the consent of all the creditors. An agreement on the part of an insolvent debtor to give one creditor a larger proportion of his claim or better security than the others in order to induce him to withdraw his objection to such a discharge, is void because it is for the purpose of defrauding the other creditors.

**Auction Sales** are a means of converting property into its actual value in money, by offering to buyers fair and free competition. The employment by the seller of persons as by-bidders, who are to make bids for the sole purpose of forcing up the price, and with the understanding that they are not to be held responsible for their bids, is a fraud upon honest bidders. Where such fraudulent bids are used, the buyer is under no obligation to accept the property if the bid immediately preceding his was fraudulent. So where persons who want the same article agree that some of them shall abstain from bidding and share the profits of buying it cheaply, such agreements are a fraud upon the seller, and consequently void.

**Assignments.**—Where a debtor in failing circumstances assigns or transfers his property to another, for the purpose of keeping it out of the hands of his creditors, such a transfer is a fraud upon them and can be set aside. Between the parties themselves, however, such an assignment is binding. A person making such an assignment cannot recover the property, although his creditors can.

### QUESTIONS.

Define subject matter. What may be the subject matter of a contract? What effect has illegality of subject matter on executed contracts? Give the general classes of contracts that are void because of illegal subject matter. What is meant by against public policy? What kinds of contracts are against public policy? What is meant by contracts in restraint of trade? Distinguish between reasonable and unreasonable

restraint. In what kinds of contracts does this restraint most frequently arise? What do you understand by contracts in restraint of marriage? What is said of reasonable and unreasonable restraint? What is a marriage brokerage contract? What is said of its effect? What contracts are perverse of the acts of government? Give examples. What is said of their effect? What contracts are obstructive of the course of justice? Give examples; effect. What is said of contracts with an immoral tendency? Give the principal contracts that come under this head. Give the effect of contracts for the performance of worldly labor on Sunday; of contracts made on Sunday. What is a wagering contract? Give its effect. How may a fraudulent contract have illegal subject matter? To what does it usually relate? What are insolvent laws? How do they give rise to fraudulent contracts? How do auction sales give rise to fraudulent contracts? What is an assignment? How may it be fraudulent? What effect has it?

## CHAPTER VII.

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### REMEDIES.

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**Definition.**—A remedy is the legal means employed to enforce a right or redress an injury. Where two persons enter into a contract, certain rights are thereby created; that is, each has a right to demand performance on the part of the other. A farmer enters into a contract with a grain dealer to sell to the grain dealer one thousand bushels of wheat at eighty cents per bushel. The contract, the moment it is entered into, establishes the right of the dealer to have the wheat delivered to him, according to the terms of the agreement, and the right of the farmer to be paid the price. If either refuses to perform his part of the agreement, it is an infraction of the other's rights, and constitutes what is called a breach of the contract. Such rights would be of no value without some power to enforce them, or to compensate the party who has suffered by reason of their violation. This power the law possesses through the means called remedies. Remedies are divided into two general classes, criminal and civil.

**Criminal.**—A criminal remedy is the means provided by law for the punishment of a violation of the criminal law. Its object is the protection of the community, rather than the compensation of the individual. Where a person is guilty of theft, or robbery, the remedy is the imprisonment of the criminal, for the protection of society against further acts of this kind. The criminal remedy, being a part of the criminal law is outside the province of this work.

**Civil.**—The civil remedy is the means provided for enforcing private rights or redressing private injuries, such as the breach of a contract, trespass on private property, etc. The different steps in the remedy are suit, judgment, and execution.

**Suit.**—Where a person desires redress for a breach of contract or other injury, the first thing necessary is to bring a suit, or action, in the proper court, against the person responsible for the injury. The suit is brought by making a written statement to the court, setting forth the terms of the contract, stating that it has been broken, and asking for redress. The suit is for the purpose of examining the evidence to see

whether the contract has been made and broken, or whether other injury has been done as claimed by the party bringing the suit.

**Judgment** is the decision of a court in an action. If the facts are found from the evidence to be as claimed by the party bringing the action (called the plaintiff), the court will order that the party sued (called the defendant) do something to repair the injury, usually pay money to the injured party. This order is called the judgment. A judgment may be for damages, specific performance, or an injunction.

**Damages.**—In most cases where a contract has been broken, or an injury suffered, the court will order a money compensation to be paid, and that is called awarding damages. Every one ought to do as he agrees, but if he does not, the law will not generally compel him to do so, but will simply estimate the injury to the other party in money, and order that he be paid that amount by the party causing the injury. The general rule is that in an action for a breach of contract, the party in default is liable to the other party for such injury as naturally results from the breach, or which may fairly be supposed to have been within the contemplation of the parties when the contract was made, as the probable result of its breach.

**In Contracts for the Payment of Money** the damages to be awarded in case of a breach can be very easily determined, since the injury sustained is simply the amount agreed to be paid, with legal interest thereon from the time the money became due. The use of the money is supposed to be worth what the law of the state has fixed as the legal rate of interest, consequently the payment of the full amount agreed to be paid in the contract, and legal interest from the time it became due, is considered to be full compensation.

**In Contracts for the Sale of Goods.**—When the seller of goods fails to deliver them according to the contract, the purchaser can recover as damages whatever the market value of the same kind of goods, at the time agreed upon for delivery, exceeds the purchase price which had been agreed upon, with interest at the legal rate from that date. In case the purchaser has paid for the goods, he recovers as damages the market value on the day of delivery, with interest.

Where the buyer refuses to accept the property, the seller may store it for him and sue for the purchase price; he may resell the property in such manner as will best subserve the interests of the first buyer by securing the highest price, and recover whatever he may lack of obtaining the purchase price agreed upon; or he may keep the goods and recover from the buyer whatever the market price on the day fixed for delivery may be less than the contract price. In each of these cases the seller recovers interest at the legal rate from the day of delivery.

**In Actions for Services.**—In case an employee is discharged without his own fault before the term for which he was engaged had expired, he may recover whatever loss he sustains. If he cannot get other work he may recover the full amount of wages he would have received if he had not been discharged. If he gets other work, but is not able to get as good wages as he was working for when discharged, he can recover the difference between the sum he earns and what he would have earned had he continued in the old employment. It is necessary, however, that he use diligence in looking for other employment, in order that he be entitled to damages.

**Liquidated Damages.**—In some contracts the parties themselves fix in advance the damages to be paid in case the contract is broken; that is, they agree upon a sum of money which one party failing to perform his part of the agreement, shall pay to the other, and it is inserted in the contract. This sum is called liquidated damages. There is a strong tendency on the part of the courts to disregard such agreements, unless they are perfectly fair and just to both parties. Where an attempt is made to enforce the payment of liquidated damages, the agreement will be enforced by the court only where the damages agreed upon are reasonable. If they are unreasonable, the agreement will be disregarded and reasonable damages awarded.

**Remote Damages.**—As we have seen, the rule is that any one breaking a contract is liable only for the injury that naturally results from the breach. He is not bound to pay for any injury that may be remotely caused by his failure. A debtor fails to pay the money he owes at the agreed time, and the creditor who has relied upon this to meet his obligations is financially embarrassed, and his business is ruined. This is, in a certain sense, the result of the debtor's breach of his contract, because if he had performed his agreement the failure might not have occurred, yet in the contemplation of the law it is remote. Many other causes beside this help to cause the financial loss to the creditor, and to compel one person to pay for it all would be unjust. The direct injury is the loss of the money and its use for a certain time, and this, as we have seen, must be paid for, but more than this cannot be collected.

**Speculative Damages.**—In order to be collected, damages must not only be direct but they must be certain. By reason of the failure of one party to fulfill his agreement, the other may be deprived of something of value, and he may also lose profits from its use that he would otherwise have had. The amount of these profits is uncertain, speculative, and cannot be recovered. If, however, the profits can be ascertained with any degree of certainty, they can be recovered.

**In Actions of Tort.**—We have so far spoken only of damages recovered for a breach of contract. It frequently happens that injuries occur without any breach of contract, for which an action for damages can be brought. Such cases are called torts. Examples are slander and libel, assault and battery, trespass, etc. Any wrong or injury of this kind inflicted by one person upon another, must be paid for in damages. The extent of the injury not being usually capable of exact computation, the amount of damages is largely a question for the jury.

**Exemplary Damages.**—Where the injury in case of a tort is inflicted with a malicious motive, the law sometimes allows what are called exemplary, or vindictive damages; that is, the damages are made heavy for the purpose of punishing the offender and making an example of him to deter others. Such damages are never allowed for a breach of contract, but only for a willful and malicious tort.

**Specific Performance.**—In case of a breach of contract, the judgment of the court is usually for a money compensation, but there are some cases in which what is called specific performance will be ordered; that is, the party who has broken the contract will be ordered to fulfill it. For example, where a person has contracted to sell land, and then refuses to do so, the court will sometimes enforce the sale.

**Injunction** is another kind of judgment that is frequently rendered. Where a person attempts to do a thing which he has agreed not to do, or which he has no right to do, the court on proper application will order him to desist, and this order is called an injunction.

**Execution.**—If the party against whom the judgment is rendered does not comply with the order, it is necessary that compliance be enforced, and for this purpose what is called an execution is issued; that is, the proper officer, the sheriff or constable, is ordered to enforce compliance. If the judgment is for the payment of money, the officer seizes and sells so much of the defendant's property as may be necessary to satisfy the claim. If for specific performance, the officer will be ordered to do for the party what he has refused to do.

## QUESTIONS.

Define remedy. What kinds are there? Define criminal remedy. What is its object? Define civil remedy. Give the different steps. What is a suit? judgment? What are the parties to a suit called? Define damages. What determines the amount of damages that will be awarded in contracts for the payment of money? for the sale of goods? for services? What are liquidated damages? What is said of their collection? Define remote damages. What is said of their collection?

Give examples. Define speculative damages. Give example. What is said of their collection? Define tort. What determines the damages in such cases? What are exemplary damages? When are they allowed and why? What is judgment for specific performance? when granted? Define injunction; execution.

## CHAPTER VIII.

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### DEFENSES.

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#### STATUTE OF FRAUDS.

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**Definition.**—It frequently happens that where an action has been brought against a person because of the violation of the terms of an agreement, the person sued has some good reason why he ought not to be compelled to pay damages, or otherwise conform to the demands of the party suing. This reason is called a defense. His defense may be that he never made the contract; or, if he admits the contract, it may not be binding; or there may be some other reason why he ought not to be compelled to carry out his agreement or pay damages for his failure.

**The Statute of Frauds** is the first of these defenses that we will consider. An old English law was called “The Statute of Frauds and Perjuries,” because its object was to prevent fraud and perjury. It required many contracts to be in writing, because of the difficulty of remembering them correctly when made orally, and provided that unless they were in writing and signed, they should not be enforced. This statute has been partially reenacted in the different states<sup>1</sup> in the Union, and is referred to simply as the Statute of Frauds.

**Requirements of the Statute.**—This statute as reenacted in the different states, usually requires that the following kinds of contracts must be in writing, and signed by the party to be charged, in order to be binding: (1) Promises to answer for the debt, default or miscarriage of another; (2) agreements made in consideration of marriage, except mutual promises to marry; (3) leases of land for more than one year; (4) contracts for the sale of lands or any interest in lands; (5) agreements that by their terms are not to be performed within one year from the making of them; (6) agreements of an executor or administrator to be personally responsible for the debts of the estate; (7) contracts for the sale of personal property involving more than fifty dollars, unless some part of the property be delivered, some part of the price be paid, or the sale be by auction.

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<sup>1</sup> In Maryland and New Mexico there is no Statute of Frauds.

**Meaning of the Statute.**—All that is necessary in order to fill the requirements of the statute that the above contracts be in writing, is that a written statement containing the substance of the agreement, in terms sufficiently plain to be understood, be signed by the party to be charged; it need not be signed by the other party. It of course applies only to executory contracts. After a contract to which the statute applies has been executed, it is binding whether it was in writing or not. The statute does not make the contract void, but simply says that no action shall be maintained to enforce performance. If it has already been performed, no action is necessary and the statute has no effect. In the application of the statute there is a distinction between the subject matter and the consideration. If the subject matter has been performed, payment of the consideration can be enforced; but, although the consideration has been paid, no performance of the subject matter can be enforced, unless there is a refusal to return the consideration. Thus, A agrees orally to lease B a piece of land for two years, for a rent of two hundred dollars. This contract is not binding; but if B takes the land under this agreement and uses it for two years, A can collect the rent. If, however, B should pay the rent in advance, A might return it and refuse to rent the land.

**Answer for Default of Another.**—A promise to pay the debt of another, if he does not pay it, must be in writing in order to bind the promisor. A and B go into a store together, and A tells the merchant to let B have goods saying, "If B does not pay for them I will." This is a promise on the part of A to answer for B's debt, if he does not pay it, and must be in writing in order to be binding. If A had said, "Let B have the goods and I will pay for them," this would make the debt his own and not B's, consequently he would be bound by his oral promise. The promise, in order to be within the meaning of the statute, must be made to the creditor. A promise made orally, on sufficient consideration, to a debtor to pay his debts or a certain part of them, is binding. So also the promise must be made to answer for the debt of another *provided he does not pay it*. A promise to be responsible for the debt of another, that is, to take the debt off his hands and release him from his liability, even though made to the creditor, is binding without being written. This is not an agreement to answer for the default of another, as the statute requires.

**Consideration of Marriage.**—Marriage may be a consideration for any other promise, and the statute of frauds provides that any agreement founded upon this consideration shall be in writing.<sup>1</sup> This refers

<sup>1</sup> This clause of the statute is not found in Pennsylvania, North Carolina and Louisiana.

principally to what are known as marriage settlements. A father promises a son a farm if he will marry; a man agrees to deed one-half of his property to a woman if she will marry him; all such are promises made upon consideration of marriage, and must be written in order to be binding. Mutual promises to marry are not included in this section of the statute.

**Sales and Leases of Land.**—Contracts for the sale of lands, or any interest in lands, and leases of lands for more than one year must be written. This does not refer to deeds conveying land (which are required to be in writing for an other reason than the statute of frauds), but to agreements to make a deed at some future time.

**Agreements not to be Performed within One Year.**—This applies, as will be seen, only to an agreement that *by its terms* is not to be performed within one year from the making of it. That is, in order to bring it within the statute, the agreement must state that it is not to be performed within a year, or this fact must otherwise appear from its terms. Thus, if A enters into a contract with B agreeing to pay him one hundred dollars in two years, it must be in writing to bind him. So if A should agree to work for B one year, beginning in two months, it must be in writing, because we can see from the terms of the agreement that it is not to be performed within one year. If the contract is to build a house, or do any other piece of work that may occupy more than a year, but may be completed in less, it need not be written, even though both parties expect it to occupy more than a year. Any contract that can possibly be performed within a year does not come within the provisions of this statute, unless it is expressly agreed that it is not to be so performed.

**Sales of Personal Property.**—The provisions of the Statute of Frauds regarding personal property, as reenacted in most of the states, usually require that a sale of personal property, of the value of more than fifty dollars, in order to be binding, must be evidenced by a writing, unless some part of the goods is accepted, or some part of the price paid at the time of the sale, or the sale be by auction. It has been modified in some of the states by changing the amount, and in a few it has not been reenacted.<sup>1</sup>

**Other Provisions.**—In all the states the statute has several provisions other than those mentioned above, but these are the most im-

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<sup>1</sup> It is \$30 in Maine, New Jersey, Missouri and Arkansas; \$33 in New Hampshire; \$40 in Vermont; \$200 in California and Idaho; \$300 in Montana and Utah; in Florida and Iowa a sale of personal property of any amount must comply with one of these conditions.

portant ones, and are the only ones that have a direct connection with the laws of business.

**As a Defense.**—The Statute of Frauds requires that certain contracts, in order to be binding, must be in writing, hence a contract that does not comply with these conditions cannot be enforced. Therefore, when a suit is brought on such a contract, the defendant needs only to set up the statute as a defense, and the court will relieve him from all liability.

### QUESTIONS.

Define defense. In what may it consist? What is the Statute of Frauds? Name its requirements. What is the meaning of the statute? To what kinds of contracts does it apply? Why not to executory? What distinction is made between consideration and subject matter? What is meant by “answering for the default of another?” Give example. Give the application of the statute to this kind of a promise. What is a promise in consideration of marriage? Give example. Give the application of the statute. How does the statute apply to sales and leases of lands? What does the statute mean by agreements not to be performed within one year? Give example. What application has the statute to sales of personal property? Under what circumstances may the statute be set up as a defense?

## CHAPTER IX.

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### DEFENSES.

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#### STATUTE OF LIMITATIONS.

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**Definition.**—The natural course of events is for him who owes a debt to pay it, and for him to whom a debt is due to demand it. It is very rare for a person to allow a claim, which is enforceable at law, to lie for a long period unpaid. Also, as a claim gets very old it becomes more difficult to get at the evidence to support it, and to defend against it; consequently a claim ought not to be allowed to remain for a long time unsettled. On these two grounds, laws have been passed in nearly all the states providing that, after the expiration of a certain period, no action shall be maintained to enforce a claim. These laws are called Statutes of Limitation, because they limit the time in which suit can be brought upon a debt.

**Provisions.**—This statute limits the time during which suit can be brought on a large number of claims, and the time varies from one to twenty, and even more years, according to the state in which it is found, and the kind of claim. Generally the time is longer for actions concerning real estate and contracts under seal than for simple contracts. In actions for the recovery of real estate and on sealed instruments, the period varies from five to twenty-one years. In the majority of the states, however, the period is above ten years, generally fifteen or twenty. On simple written contracts the period varies from three to twenty years, but in most of the states it is five or six years.<sup>1</sup> On oral contracts, open and book accounts, etc., it is usually from two to six years, but in one or two states as high as ten.<sup>2</sup>

**Beginning of the Period.**—The period of limitation begins when—

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<sup>1</sup> As long time as twenty years is given in a few states on promissory notes signed in the presence of witnesses. Indiana allows twenty years on written contracts not for the payment of money.

<sup>2</sup> The student should refer to the statutes of his own state for the kinds of actions limited, and the period of limitation on each. The limitations in the different states are so many and so varied that it is impossible to give them here.

ever the debt is due, or whenever an action for its recovery might have been commenced. In the case of a note it begins on the expiration of the last day of grace. On a sight draft, when the draft is presented for payment. In a claim for services, when the work on which the claim is based is completed, unless the time of payment is extended by agreement. On a running account it begins from the date of the last item on either side.<sup>1</sup>

**Disability of the Creditor.**—There are some circumstances, however, which will prevent the period from beginning when the debt becomes due. A person who is not competent to make a contract is not generally competent to bring a suit against another. If the creditor is under a disability so that he cannot bring an action when the debt becomes due, that is, if he is an infant, or is insane, etc., or if he is absent from the state, the beginning of the period is suspended. In some states it is provided that he shall have the full period after the disability is removed, or after he returns to the state where the action must be brought.<sup>2</sup> In the others different periods are allowed after the removal of the disability, varying from one to five years.<sup>3</sup> In many of the states where a particular period is prescribed, a longer period after its removal is allowed on actions connected with real property than on others. The disability must exist, however, when the debt becomes due, or the period will begin to run, and then it is not stopped even if a disability occur.

**Absence of Debtor.**—Where a debtor is absent from the state when the cause of action arises, the period of limitation does not begin until his return. According to the old rule, if the debtor is in the state when the debt becomes due, or comes in afterwards and then leaves, the period will commence and continue running whether his presence was known to the creditor or not. This, however, has been modified in this country. In some states it has been enacted that the time during which the debtor is absent shall not be counted; successive absences are

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<sup>1</sup> This provision is made by statute in some of the states, but in the absence of such a provision it is by no means settled that this is always the law.

<sup>2</sup> This is true in the following states: Arkansas, California, Colorado, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, Washington, Wyoming.

<sup>3</sup> It is one year in the following states: North and South Dakota, Kansas, Minnesota, New Mexico, Oregon, South Carolina, Iowa. In Illinois, Indiana, and New Hampshire two years are allowed. Three years are allowed in Alabama, Delaware, and Tennessee. In Wisconsin five years are allowed.

thus taken out and the period extended that much.<sup>1</sup> Even where such a law has not been passed, the courts in this country have generally held that the presence of the debtor in the state must be sufficiently open and for a sufficient time that the creditor, by the exercise of reasonable diligence, can discover his presence and bring his action.

**New Promise.**—As we have seen, the statute of limitations is based on two grounds. The first of these, the one on which it was first considered to rest, is the presumption, from the lapse of time, that the debt has been paid. When this was the only ground, it might be overthrown by positive proof that it had not been paid, like an acknowledgment of the debtor himself of his liability. In this country, however, the ground for the statute has been considered to be the desirability of preventing the revival of old and stale claims, consequently a mere acknowledgment of the debt is not sufficient to take it out of the operation of the statute. The debtor, however, has a right to waive the benefit of the statute, consequently if he makes a promise to pay the claim after it is barred, this will revive it, and it will then continue binding again during the whole period. It is sometimes difficult to tell whether there has been a new promise, or a mere acknowledgment, consequently it has been enacted in most of the states that such new promise must be in writing in order to be binding.<sup>2</sup>

**Part Payment.**—A voluntary payment by the debtor of part of an outlawed claim, is considered conclusive proof of an acknowledgment on his part of his liability and of an intention to pay, consequently this has the effect of reviving his liability as to the balance. In such a case it is only necessary to show that the payment was intended, by the party paying, as a part payment on the outlawed debt. If the payment was made with the understanding that it should be full settlement, of course no promise to pay the balance can be implied. The part payment can be made in property as well as money, and will equally operate as a revivor, if the intention can be shown. So if the debtor gives his promissory note as part payment it will revive the whole.

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<sup>1</sup> Such a law has been passed by the following states: Alabama, North Dakota, South Dakota, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nevada, Ohio, Rhode Island, Tennessee, Utah, Vermont, West Virginia, Wyoming. It is true also in North and South Carolina, if the absence is more than one year.

<sup>2</sup> This is true in the following states: Alabama, Arkansas, California, North and South Dakota, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

**Affecting Collateral Security.**—It is important to remember that the statute of limitations does not cancel the debt, but simply provides that “no action shall be maintained upon it” after a given time. Therefore, if the debt which has been barred by the statute is secured by a mortgage which is not affected by the statute, this can be foreclosed and the property which it covers sold to pay the debt even when the debt itself cannot be sued.<sup>1</sup> If the property on which the mortgage is given is not sufficient to pay the claim, of course nothing further can be obtained.

**Law of Place.**—Another consequence of the fact that the statute does not cancel the debt but merely destroys the remedy, is found in the fact that, no matter where the contract was made, the law of the place where it is sought to be enforced determines whether it is barred or not. The general rule where there is no statute to the contrary is, that although a contract is outlawed where it was made, if the parties move to another state with a period of limitation long enough so that it has not expired, the contract can be enforced. Several of the states have provided by statute, however, that no claim shall be enforced there that is barred by the statutes of the states where it is made.<sup>2</sup>

**As a Defense.**—Where the period of limitation fixed by the state for a particular contract has expired, and suit is brought to enforce it, as in the case of the statute of frauds, all that is necessary for the defendant to do, is to set up that fact as a defense and he will be relieved from all liability.

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<sup>1</sup> In Mississippi it is provided by statute that if the note is barred by the statute the same is true of the mortgage given as security.

<sup>2</sup> Such provision is made by statute in the following states: Idaho, Iowa, Kansas, Montana, Nebraska, Ohio, Tennessee, Washington, West Virginia, Wyoming.

### QUESTIONS.

What is the statute of limitations? What is its object? What are its provisions? When does the period of limitation begin? Are there any exceptions to this? What will suspend the beginning of the period? What is the law now with reference to the absence of the debtor? What is the effect of a new promise after the debt is barred? What provisions have the different states made regarding a new promise? Why? What is the effect of paying part of an outlawed debt? What must be shown in order to have that effect? What effect has the statute on collateral security? What is said of the law of place as applied to the operation of the statute? When may a statute be set up as a defense?

## CHAPTER X.

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### DEFENSES.

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#### PERFORMANCE, ETC.

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**How this Differs from Foregoing.**—The defenses treated of in the two preceding chapters have referred to the validity of the contract. In setting up one of these defenses the defendant simply answers that he ought not to perform his part of the agreement because the contract is not binding. In this chapter we treat of the defenses set up where the defendant has already done what he agreed to, or has shown himself ready to do so, or is released from his obligation by some act of the plaintiff.

**Performance.**—Where the contract was for the performance of some specific act, and the party is sued because of his failure, he may claim that he has performed his part of the agreement, and in that case he sets up the defense of performance; that is, he says he ought not to be compelled to pay damages because he has already done what he agreed to do.

**Manner.**—In order to constitute a good defense, the performance must conform to the terms of the contract as to time, place, and any other condition agreed upon, and the requirements of the law. The rule formerly was that the party should be held strictly to the terms of his contract, and if there was the slightest variation it would not be a performance. This rule has been somewhat relaxed, so if there has been a substantial performance it will be good, allowance of damages, of course, being made for whatever trivial omissions or defects there may be.

**Time** is sometimes an important element in the performance of a contract. When a time was definitely fixed in the agreement for the performance, the party setting up this defense must show that this condition has been complied with, or that it was not important. If he can show that he has performed his agreement at another time than the one specified, but that the time is unimportant, that is, that the other party has suffered no injury by reason of the change, it will be a good defense.

Where a person agrees to perform anything a certain number of days from date, the day on which the contract was made is not counted, and he has all of the last day specified in which to perform. If the time specified for performance falls on Sunday, he has all of the day following to perform, with the exception that will be mentioned hereafter in the case of negotiable paper.

**Impossibility.**—If by some unforeseen hindrance, arising after the contract was made, it becomes impossible for one party to perform his part of the agreement, he will be excused from so doing, and will not be compelled to pay damages for his failure. It must be an actual physical impossibility, not a mere hardship or inconvenience, in order to furnish an excuse, and must be other than that arising from lack of pecuniary means. Although precise and literal performance is impossible, if a substantial performance is possible the impossibility will be no excuse. If the impossibility might have been foreseen or prevented by ordinary prudence, the promisor will not be released from his liability, nor will he be if he is himself responsible for the impossibility.

**Payment.**—Where the contract is for the payment of money, the defense corresponding to performance in other contracts is payment. In order to make good this defense, the party setting it up must show that the money was delivered to the party making the claim, or his authorized agent, and in accordance with the terms of the agreement.

**Legal Tender.**—Unless the creditor accepts something else, the payment must be made in money which has the quality of being legal tender; that is, money which Congress has declared must be accepted if offered in payment of debts. The kinds of money now possessing this quality are gold, silver, copper and nickel coins, greenbacks, and some of the later issues of silver certificates. All gold coins and the silver dollar are legal tender for any amount. Silver coins below one dollar are legal tender in amounts not exceeding ten dollars. Copper and nickel coins are legal tender for only twenty-five cents. Greenbacks, or United States notes, are legal tender for any amount, and for all debts except duties on imports and interest on government bonds.

It will be noticed that the currency having legal tender qualities does not include National Bank Notes nor any gold or silver certificates issued prior to 1890, which constitute a large part of the money of the country. As a matter of fact debts are paid every day in money which is not legal tender, and is accepted without question because it is as good as gold, and when so accepted constitutes a good payment. The money, however, must be what it purports to be in order to make a good payment. If it should turn out to be counterfeit, it is no payment.

although accepted as such, but the counterfeit money must be returned within a reasonable time.

**Payment by Note.**—A contract for the payment of money is frequently performed by giving a note in settlement. The effect of this is simply to postpone the real payment until the time specified in the note. If A agrees to pay B a certain sum on a specified day, and when that day arrives B accepts A's note due in sixty days, this merely extends the original contract sixty days, and when that time expires B can sue on the original debt.

**Place of Payment.**—Where a place is specified in the agreement at which payment is to be made, the defendant, in order to make good the defense of payment, must show that this condition has been complied with. Where a note is made payable at a bank on a certain day, the money must be there before the close of banking hours on that day. If the creditor directs the money to be sent to him in a certain way, the money so sent will constitute payment whether it reaches its destination or not.

**Presumption of Payment.**—There are certain circumstances which afford evidence of payment so strong that they are said to raise a presumption of payment. That is, in the absence of direct and positive evidence to the contrary, the court in which the action is brought will presume the debt to have been paid. Ordinarily where a person gives his note, he does not again get possession of it until he pays it; consequently where a person has in his possession a note made by himself, he is presumed to have paid it, unless there is positive evidence to show the contrary. The possession of a receipt also raises such a presumption, because ordinarily men do not give receipts without receiving money. These circumstances are only presumptive evidence, however, and may be overcome by stronger evidence to the contrary.

**Tender.**—This defense is very closely allied to the defenses of performance and payment. It is an offer of something in satisfaction of an obligation. Where a person has entered into a contract, all that can be asked of him is that he carry out strictly the terms of the agreement, and since it is the policy of the law to discourage litigation, an expressed willingness to perform is a good defense to an action for damages for non-performance.

**Object.**—A tender is an admission that the amount offered is due, and the object of making it where it will not be accepted is not to be released from paying the claim, but to escape the payment of damages and costs. Where the obligation is for the payment of money, there is no occasion for refusing to accept the amount tendered unless there is a dispute between the parties as to the amount due. Where the offer is

refused on the ground that it is not enough, suit can be brought. If more is recovered than was offered, the costs of the suit will have to be paid by the defendant, but if the judgment is for the same amount or less than the tender, the costs must be paid by the plaintiff. Thus, if A is indebted to B in an amount which he claims is twenty dollars, but which B claims is thirty, A can make a tender to B of the twenty dollars which he acknowledges he owes, and B must either accept that or nothing. If he refuses on the ground that it is not enough, nothing remains for him to do but to sue A, and unless judgment is rendered in his favor for more than the twenty dollars offered by A, the costs of the suit must be paid by B.

It sometimes happens that one party refuses to perform his part of a contract which is entirely executory. In such cases the other party must make a tender of whatever is required of him; that is, he must offer to perform his part of the agreement before he can enforce performance from the other. For example, if A agrees to buy of B certain goods, and then without just cause, decides that he will not accept them, B must make a tender of the goods before he can recover the purchase price.

**Requirements.**—In order to make a legal tender, the exact amount of money owed must be produced and offered, unless, before the money is produced and counted out, the party to whom it is to be offered positively refuses to accept it. The tender must have no condition annexed to it that the creditor can have any good reason for objecting to. For instance, if the offer is accompanied by a demand for a receipt in full, it will not be a good tender. An offer is a good tender only when made in money that has the quality of legal tender. If, however, the creditor does not object on the ground of the kind of money, he will be deemed to have waived this requirement. Unless the contract provides for the place of payment, the debtor must seek the creditor if he is in the state and make the tender to him. If the money due is for rent, and no place is named in the lease where it is to be paid, it is due on the premises, and the tender of the amount there is sufficient.

**Accord and Satisfaction.**—Generally defined, accord and satisfaction is another agreement between the parties, made and executed in satisfaction of the former one. Where there is a controversy as to the amount of a debt, and a compromise is reached by which both parties are satisfied, and the claim is settled, this constitutes accord and satisfaction. Payment of a less sum than the debt, where there is no dispute as to the amount, is not satisfaction for the remainder, even though it is accepted as such, and the party thus accepting part payment as full settlement can afterwards collect the remainder.

The reason for this is that there has been no consideration for the release of part of the debt, consequently such release is not binding. If, however, a part be paid, or additional security be given for a part before it is due, on consideration of the release of the balance, this payment, or giving additional security before due, will be a sufficient consideration for the partial release, and the settlement will constitute accord and satisfaction. Where something else is given instead of what is claimed, and is accepted as payment, this will constitute accord and satisfaction, without regard to the actual value of the property accepted. Of course, if a defendant in an action for breach of contract, can show that an accord and satisfaction for the claim has been entered into and executed, this will constitute a good defense to the suit.

**Arbitration and Award.**—This defense is somewhat similar to the preceding one. In accord and satisfaction, the parties themselves have decided what shall be done by one to satisfy the claims of the other; in arbitration and award, they agree to submit this question to third parties, called arbitrators. Where a claim is submitted by the parties to arbitrators to decide, and is decided by them, their decision is binding if properly given; that is, if given in accordance with the terms of the contract by which the claim was submitted to them, and their decision would be a defense to a suit in which something else was demanded on this claim. Where a disputed claim has been submitted to arbitrators, either party can revoke the submission at any time before the award is made, and where a person has agreed to submit a claim to arbitrators, he is not obliged to carry out this agreement unless he wishes.

**Alteration.**—The changing of a written instrument by erasure, interlineation, etc., by one party without the consent of the other, renders it void, and if this can be proved, it is a good defense to an action for a breach of the contract. It was formerly the rule, that any alteration of whatever nature, made in this way, made the agreement void, but the rule has been so changed, that an alteration to have this effect, must be material; that is, it must change the meaning and effect of the agreement.

**Pendency of Another Suit.**—It is not the policy of the law to encourage litigation, hence it will not permit anyone to bring more than one suit at the same time against the same person, and for the same cause of action. Therefore, it is a good defense to a suit that another is then pending between the same parties, and for the same cause. The requirements that the two actions must be for the same cause, is strictly enforced, and it is not enough that the same property be in controversy in both actions. It has been held that the pendency

of an action for rent, alleged to be payable quarterly, is no defense to an action for the same rent under a claim that it is payable at the end of the year. The question to be determined in setting up this defense, is whether the same evidence will be required to support both actions; if so, then the pendency of one is a defense to the other; if not, it is no defense. In order that this defense be good, it must also be shown that the suit which is set up as a defense was pending when the other was begun.

**Set-off.**—This is a mode of defense by which the defendant acknowledges the justice of the plaintiff's claim, but sets up a demand of his own to counterbalance it in whole or in part. A owes B one hundred dollars, but claims that B is also indebted to him in the same amount. If B sues to collect his claim, A can set-off his claim against B, and if he can substantiate it, it will be a good defense to the action.

### QUESTIONS.

In what respect do the defenses treated in this chapter differ from the preceding ones? What is the defense of performance? In order to make a good defense, what must be shown with reference to the manner of performance? time? What is the effect of impossibility of performance? What is the defense of payment? In what kinds of money must it be paid? What kinds of money are legal tender? What is the effect of making payment by note? Where must payment be made? What circumstances will raise a presumption of payment? What is the defense of tender? Give its object; requirements. Define accord and satisfaction; what constitutes? How does it operate as a defense? What is arbitration and award? Give its effect. What is the effect of altering a written agreement without the consent of both parties? What constitutes a material alteration? What effect has the pendency of another suit on the one last commenced? What must be shown in order that it have this effect? What is set-off? What is said of it as a defense?

## CHAPTER XI.

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### NEGOTIABLE PAPER.

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#### GENERAL PRINCIPLES.

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**Definition and Use.**—By negotiable paper is meant written evidences of debt which may be transferred by indorsement or delivery, giving the holder the full right to sue and collect it. A large part of the business of the country is done on credit, the money to be paid at some future time, and this being the case, it is necessary to have some evidence of debt that can be transferred, and thus perform the function of money. To meet this demand we have the different kinds of negotiable instruments, by which the payment of debts is postponed to some future time.

**Characteristic.**—The feature of negotiable paper which makes it valuable as a substitute for money, is the fact that, in the hands of an honest purchaser, it can be collected whether it was binding in the hands of the original holder or not. Thus a negotiable instrument given by A to B, without consideration, cannot be collected by B, but if it is bought by C he can enforce payment from A. This peculiarity is necessary in order that such instruments may be readily transferred; one would not care to buy a note he knew nothing about, if by some irregularity in its execution he might lose the amount it represents. Negotiable paper is sometimes spoken of as paper that can be transferred, but this is incorrect. A debt of any kind can be transferred, and a non-negotiable note, which is merely evidence of debt, can be assigned in the same way as a debt not evidenced by writing. If transferred, however, it gives the buyer no rights which the seller did not possess, and can be collected by him only in case it was valid in the hands of the original holder.

**Necessary Conditions.**—Since the object of negotiable paper is to serve as a substitute for money, it must be written in such a form that one can accept it without hesitancy. While no particular form of words is necessary, yet an instrument, in order to be negotiable, must conform to certain conditions. These conditions are as follows: It must be

(1) in writing, (2) properly signed, (3) negotiable in form, (4) payable in money, (5) to a designated payee, (6) payable absolutely.

**In Writing.**—Every negotiable instrument must be written. By this we do not mean that it must be written with a pen or pencil, by the person making it, but simply that the instrument shall be impressed by characters upon some substance (usually paper). A printed note is just as good as a written one. As a matter of fact, a large part of the negotiable instruments used in the business world are partly written on blanks printed for the purpose. The writing ought to be in ink to secure permanency and prevent alterations, but if written with pencil it will be valid.

**Signature.**—Paper in order to be negotiable must, of course, be signed by the party executing it. The object of signing is to show that the party has made the promise as stated in the instrument, and where this can be shown the manner of the signature is not important. It may be by the person writing on the face or back, or in the body of the instrument, his name or any mark he may choose to adopt as a signature, or the name may be printed by him or his authority. The usual method is for the party to write his name at the close of the instrument, since where this is done there can be no doubt of his having assented to it. If the signature is made in any other way, it is necessary to show by witnesses that he has given his assent to the instrument.

**Negotiable in Form.**—By being negotiable in form is meant it must contain words which indicate an intention on the part of the maker that it shall be negotiable. The usual way is to make it payable to a certain person "or order," or to "the order of" a certain person, or to a certain person "or bearer." If made payable simply to "the bearer" it is also negotiable. Any words, in fact, which express an intention that it shall be negotiable are sufficient.

**Payable in Money.**—An instrument in order to be negotiable must be made payable in money only, and not in any kind of goods or merchandise, or by the performance of some act. A person who accepts negotiable paper in satisfaction of a claim wants to know exactly what it is worth, and this would generally be impossible if made payable in anything but money which is legal tender.

**Designated Payee.**—In a negotiable instrument there must be no uncertainty as to whom the money is to be paid. It is customary to make it payable to a person by name, but this is not necessary if it is written in such a way that the payee can be determined from it. If payable simply to bearer, whoever holds it at maturity is the designated payee. Any description of the payee, such as the secretary of a certain

corporation, or a certain county officer, etc., if sufficiently clear to make certain the person intended, is sufficient.

**Payable Absolutely.**—Negotiable paper must be payable absolutely; that is, it must signify an unconditional obligation to pay. There must be no uncertainty as to the amount and no contingency as to the time of payment. The promise of payment must be absolute as to (1) amount, and (2) time.

**Amount.**—In order that an instrument be negotiable, the amount to be paid must be certain and definite, and stated in the body of the instrument. It is customary to write the sum of money in words in the body of the instrument, and express it in figures also in the upper or lower left-hand corner; but this statement in figures in the corner is placed there merely for convenience of reference, and is no part of the instrument. If the amount as stated in figures does not agree with that in words, the words govern, and no oral evidence can be introduced to show that the figures are correct. If the amount is not placed in the body, although it is in figures in the corner, the instrument is defective. Not only must the amount be placed in the body of the instrument but it must be certain. A promise to pay at a certain time "whatever is then due" is not negotiable. Neither is a promise to pay a certain sum out of a particular fund, because the payment will depend upon the existence of the fund.

**Time.**—The time of payment must not depend upon any contingency; that is it must be sure to come. A note made payable on the marriage of a certain person, or on his arrival at majority, is not negotiable, because there is no certainty that either of these events will ever happen. If made payable at one's death it is negotiable, since it is sure to be payable sometime. It is usual to make it payable at a certain time after date, or upon a certain date. If made payable "on demand," or "at sight" it is negotiable, although the date of payment is placed at the discretion of the holder. In this case the date of payment is uncertain, but since the rule requiring certainty is for the benefit of the holder, there is no reason why it should apply in this case, as he can make it certain by demanding payment.

**Days of Grace.**—Negotiable instruments become due, not on the day mentioned in them, but in reality three days thereafter. In the early history of negotiable paper it was customary to allow the one who was to pay it, three days of grace in which to make preparations to meet it. It was originally simply a matter of favor, as the name signifies, and might be granted or not at the discretion of the payee, but it has since grown into a matter of right, which is demanded. Where the last day of grace falls on Sunday or a legal holiday, the instrument is due

on the day preceding, except in a few states.<sup>1</sup> In a few states days of grace have been abolished by statute.<sup>2</sup> It will be observed, however, that grace is allowed only on negotiable instruments.<sup>3</sup> Non-negotiable instruments falling due on Sunday or a holiday, are payable on the next succeeding business day, and in those states where grace has been abolished the same thing is true of negotiable instruments.

**Value Received.**—These words are usually inserted in negotiable instruments, but they have no effect whatever. They simply indicate that value has been received by the maker, but do not prevent him from showing the contrary; that is, even if the words are used they do not prevent one from proving by other evidence that value has not been received. On the other hand all negotiable instruments, whether they contain these words or not, import a consideration, that is they indicate that value has been received, until the contrary is shown.<sup>4</sup>

**Kinds of Negotiable Paper.**—There are three general kinds of negotiable paper in use in the commercial world, viz.: promissory notes, bills of exchange or drafts, and checks.

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<sup>1</sup> In Alabama, Dakota, Michigan and Missouri it is due on the succeeding day.

<sup>2</sup> This is true in California, Connecticut, Georgia, Idaho, Illinois, Montana, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Utah, Vermont, Wisconsin.

<sup>3</sup> In most of the states grace is not allowed on sight drafts or notes payable on demand.

<sup>4</sup> In Missouri and possibly a few other states, if these words are omitted the instrument is not negotiable. Their absence does not affect the legality of the paper, but makes it simply a non-negotiable note, where with these words inserted it would be negotiable.

### QUESTIONS.

Define negotiable paper. Give its use. What distinguishes negotiable from non-negotiable paper? What is said of the importance of this characteristic? Name the necessary conditions of negotiability. What is meant by being in writing? What is said of the signature? What is negotiable form? In what must negotiable paper be payable? Why? What is said of the payee? What is meant by being payable absolutely? In what way must it be so payable? What is said of the statement of the amount? of the time? What are days of grace? What is the use of the words "value received?" What kinds of negotiable paper are there?

## CHAPTER XII.

### PROMISSORY NOTES.

**Definition and Use.**—A promissory note is a promise on the part of one person to pay to another a certain sum of money at a specified future time. As we have seen, a large part of the business of the world is done on credit. Where one person buys goods of another to be paid for at some future time, it is necessary to have some evidence of the debt which will prevent loss and misunderstanding, and the promissory note has been invented to meet this need.

**Form.**—No particular form is necessary to make a valid promissory note. It will be binding if the form is such as to make a promise on the part of one person to pay to another a certain sum of money at a specified time. Printed blanks are now generally used by business men. The following is a common form as it appears after being filled out:

#### PROMISSORY NOTE.

\$500 $\frac{00}{100}$	Rochester, N. Y., <i>July 1, 1892.</i>
<i>One year</i> after date <i>I</i> promise to pay to the order of	
<i>John Smith,</i> .....	
<i>Five Hundred and</i> $\frac{00}{100}$	~~~~~ DOLLARS.
Value received.	<i>Thomas Jones</i>

**Parties.**—To a promissory note there are two original parties, the maker and the payee. The maker is the person promising to pay and whose name is signed to the note. In the above example Thomas Jones is the maker. The payee is the person named in the body of the note to whom the money is to be paid; John Smith is the payee in the foregoing example. If the note is transferred to some one else by the payee, this subsequent party in whose possession the note is, is called the holder or indorsee. The rule as to competency of parties to a note is the same as in other contracts.

**Negotiability.**—Originally promissory notes were not negotiable, but they have been made so by statute in all the states. In order to possess the quality of negotiability they must, of course, conform to the conditions of negotiability given in the preceding chapter. The note given above is a negotiable note; if we leave out the words “the order of,” it will not be negotiable. Even though non-negotiable, as we have seen, it can be transferred by John Smith by assignment like any debt, but the person to whom it is assigned takes it subject to all the defenses that might have been brought against it in John Smith’s hands.

**Consideration.**—As we have seen, one of the essentials of a binding contract is a consideration. This applies to negotiable notes as well as to other contracts. In order to be binding between the original parties, there must be a consideration or inducement for the promise which would be sufficient in an ordinary contract. After the note has been transferred to a purchaser, however, this necessity for a consideration no longer exists. A person who gives value for a negotiable note can enforce payment from the maker, even though there was no consideration between the original parties, provided he took it without knowledge of the want of consideration.

**Accommodation Paper.**—The rule that no consideration is necessary when the note is in the hands of a subsequent party for value, is sometimes made use of in what is called accommodation paper, by which one party lends his credit to another. Suppose A, whose credit is not good at the bank, desires the use of some money for a short time. B, to whom he applies for a loan, has no money at hand, but his credit at the bank is good. B makes out his note for the required amount payable to A. This note, being without consideration, cannot be collected by A, but he takes it to the bank and has it discounted. The bank having paid for the note, it becomes binding upon B, and he is obliged to pay it the same as if it had been originally good. In the case of accommodation paper, the maker will be bound, although the purchaser knows it to be without consideration, if the note is used as agreed between the original parties.

**Holder for Value.**—In order that an invalid note be binding in the hands of a subsequent party, he must be what is called a holder in good faith for value; that is, he must have given value for the note, and not know of any defenses to it. He must buy it supposing it to be a good note. It may be asked what is giving value? It is the giving of anything that the law regards as a valuable consideration. It does not need to be the face value of the note; the giving of anything, in fact, which has a pecuniary value is sufficient to make the subsequent party a holder for value. While negotiable paper may be the subject of a

gift, the person who receives it in this way gets no rights which the person making the gift did not have. If it was made without consideration, it will not become binding by being given to a third party, because he is not a holder for value.

**Lost or Stolen.**—Where negotiable paper is lost or stolen, the finder or thief, not being a holder in good faith for value, has no rights whatever to it, and cannot enforce payment of it, even if it is made payable to bearer. But the person coming into possession of a note in this way can sell it to another, who knows nothing of his want of title, and it can then be enforced. On this account it is much better to make all negotiable paper payable to order, since it can then be transferred only by indorsement of the payee.

**Forged.**—Forgery may be committed by signing another's name to a note either as maker or indorser, or by making an alteration in a genuine instrument so as to change the amount which it calls for. Where a person's name is fraudulently signed to an instrument it is absolutely void, and no one can acquire any rights under it against the person whose name is used as maker. If the forgery is by using the person's name in an indorsement, the note is from that time void, and no one into whose hands it comes after that can acquire any rights to it. Where the forgery is by raising the amount, the maker can be held only for the original amount, unless it is through his negligence or carelessness that the forgery were possible. If he writes with a pencil so the amount can be readily erased, or leaves a blank space which enables one to change the amount without detection, he can then be held responsible for the loss.

**Kinds of Notes.**—With reference to the way they are written and signed, there are three different kinds of promissory notes in use, viz.: (1) several, (2) joint, and (3) joint and several. A several note is one with only one maker, like the one given above. A joint note is one signed by two or more persons as makers, and written "*we* promise to pay." In this case the obligation to pay is joint, that is, it rests upon the makers' together, not separately, and if the holder is obliged to sue in order to secure payment, he must sue all the makers together. If the note is written "*we* jointly and severally promise," or merely "*I* promise," and signed by more than one person as maker, it is a joint and several note, and this is true even though one of the names is marked "*surety*." The holder in enforcing payment can sue any one of the makers, or all together as he pleases. In many states statutes have been passed abolishing the distinction between joint, and joint and several notes, so that all notes signed by more than one maker, no matter how they are worded, are joint and several.

**Bank Bills** are in form and law promissory notes. They are made payable to bearer and are, of course, always transferred without indorsement. When a common promissory note is offered in payment of a debt or for discount, the first inquiry is as to the financial standing of the maker and indorsers, since its value depends upon their ability to pay it. So when state banks issued bank bills, everyone, before accepting them, had to find out something about the financial standing of the bank which issued them; that was the only assurance that the bills would be paid. Our recent National bank notes are secured by deposit of government bonds in the United States Treasury; the government thereby becomes an indorser, which makes them perfectly good without regard to the financial standing of the bank which issued them.

### QUESTIONS.

Define promissory note. Give use. What is said of the form? Who are the original parties to a note? Define maker; payee. What is a subsequent party called? Give rule as to competency of parties. What is said of the negotiability of a promissory note originally? at present? Can a non-negotiable note be transferred? What is said of consideration in negotiable note between original parties? in the hands of subsequent purchaser? What is accommodation paper? Give its use. What is a holder in good faith for value? What rights has a person receiving negotiable paper as a gift? What rights has a person to negotiable paper who finds or steals it? How may forgery be committed? What effect has it on the note? Define several note; joint note; joint and several note. How are bank bills considered in law?

## CHAPTER XIII.

### BILLS OF EXCHANGE.

**Definition.**—A bill of exchange is a written order by one person to another to pay to the order of a third person or to the bearer, a certain sum of money at a certain specified time. The term draft is simply another word meaning the same thing as bill of exchange. The distinguishing feature between bills of exchange, or drafts, and notes is, that a note is a promise on the part of the one signing it to pay the money, whereas in the draft he orders another to pay it.

**Origin and Use.**—The origin of bills of exchange is a question that has never been definitely settled, but it is only of historical importance. A method of paying debts between cities remotely situated and engaged in commerce with each other, without the trouble and risk of sending the money back and forth, would certainly be much desired in the early history of commerce, and the bill of exchange is about the only way, certainly the most convenient way, in which this can be accomplished. The draft is used in two ways. If A in Chicago owes B in New York one hundred dollars, he goes to a Chicago bank with his one hundred dollars and buys a draft for that amount on a bank in New York, paying in addition to the one hundred dollars a few cents for the bank's trouble in writing out the draft. This draft he sends to B who presents it to the New York bank and receives his money. This is one method. The draft in this case is an order from the Chicago bank to the New York bank to pay to B one hundred dollars, which in form, is like the following:

#### BANK DRAFT.

THE FIRST NATIONAL BANK,	
No. 1743.	Chicago, Ill., July 1, 1892.
Pay to the order of	
<i>J. E. King,</i> ~~~~~ \$100 <sup>00</sup> / <sub>100</sub>	
<i>One Hundred</i> <sup>00</sup> / <sub>100</sub> ~~~~~ DOLLARS,	
To CHEMICAL NAT. BANK, New York, N. Y.	<i>George W. Leek,</i> Cashier.

Suppose C in New York owes D in Chicago one hundred dollars and D wants his money. D goes to the same Chicago bank and draws a draft on C like the following:

## INDIVIDUAL DRAFT.

\$100 $\frac{00}{100}$	Chicago, Ill., <i>July 10, 1892,</i>
At sight pay to the order of THE FIRST NAT. BANK, Chicago, Ill.	
<i>One Hundred and</i> $\frac{00}{100}$	~~~~~ DOLLARS,
and charge to account of	
<i>To James Thompson</i>	<i>John Brown</i>
<i>N. Y.</i>	

This is an order by D to C telling him to pay to the bank one hundred dollars. This is sent to the New York bank which presents it to C and he pays it. When the Chicago bank is notified of this fact it pays the one hundred dollars to D. In the first instance the New York bank paid out one hundred dollars for the Chicago bank; the Chicago bank now pays out the same amount for the New York bank; no money has been sent but the account between them is balanced.

**Foreign Bills of Exchange.**—There are two kinds of bills of exchange, foreign and inland. A foreign bill is drawn in one country to be paid in another. This includes not only countries that are foreign to each other, in the ordinary acceptance of the term, but it applies to those drawn in one state of the United States to be paid in another. A draft drawn in New York and payable in Kansas is a foreign bill. When bills of exchange originated, means of communication between different countries were not so safe and sure as at present, and on account of this risk it was customary to draw several copies of a bill (usually three) and send them by different routes, or at different times, so that if one was lost one of the others would reach its destination. While the law still refers to the three copies of the foreign bill they are not now so frequently used. Between the different states of the Union more than one copy is never used. Where a bill is drawn in one country and payable in another, it is made payable in the currency of the country in which it is to be paid.

**Inland Bill.**—The bill of exchange originated in the necessity of having some means of paying debts from one country to another without sending the money, and at first there were only foreign bills. Their

convenience and safety naturally led to their use in settling domestic accounts, so that now nearly all remittances are made in this way. In the United States an inland bill is one payable in the same state in which it is drawn.

**Parties.**—In a bill of exchange there are three parties, the drawer, drawee, and payee. The drawer is the one who draws the bill, the drawee the one on whom it is drawn or who is ordered to pay it, and the payee the one to whom the money is to be paid. In the first draft above, the First National Bank is the drawer, the Chemical National Bank the drawee, and J. E. King the payee. In the other, John Brown is the drawer, the First National Bank the payee, and James Thompson the drawee.

**When Due.**—With reference to the time of payment, there are two kinds of drafts, time drafts and sight drafts. A sight draft is drawn payable “at sight,” that is, when it is presented to the drawee for payment. Time drafts are drawn payable on a certain date, a certain time after date, or a certain number of days “after sight,” that is, a certain number of days after being presented for payment. Time drafts are allowed days of grace the same as promissory notes, but in most of the states grace is not allowed on sight drafts.

**Acceptance.**—A bill of exchange being simply an order to pay money, is not binding on the drawee without his consent, and until he has consented to it he is under no legal obligation to pay it. To drafts payable on presentation this consent is given by payment. If payable a certain time after sight it is given by what is called acceptance. The payee presents the draft to the drawee, and if he is willing to pay it at the time specified, he writes across the face the word “accepted” with the date and signs his name. By so doing he promises to pay it, makes it in fact as far as he is concerned, a promissory note with himself as maker.

**Liability of Parties.**—The drawee, by his act of acceptance, becomes the acceptor and is bound absolutely to pay the bill. Before the acceptance of the bill it is really a contract between the drawer and the payee, by which the drawer agrees that the drawee shall accept and pay it, and if he does not that he (the drawer) will pay it himself. Of course this is not written in the bill but it is implied, and is as binding as though expressed. The drawee is not therefore originally a party to the bill, and may not even know of the existence of it until it is presented to him. His liability begins with his acceptance. If he refuses to accept the draft, or having accepted it refuses to pay it when due, the payee, by properly notifying the drawer of these facts, can compel him to pay it.

**Presentment for Acceptance.**—Drafts payable on a certain day, or a certain time after date, do not need to be presented at all until they are due, and then only for payment; but bills payable a certain time after sight must, of course, be presented for acceptance in order to fix the date of maturity. Presentment is also necessary in order to hold the drawer responsible for their payment. As we have seen, the drawer of a draft contracts with the payee that the drawee will accept and pay it when due, and if he fails to do this, the drawer becomes responsible; but in order to hold him to his liability the draft must be presented for acceptance, and the drawer immediately notified in case of refusal to accept. Presentment must be made by the holder or his agent to the drawee or his agent authorized to accept it, within a reasonable time after receiving the draft. Just what is a reasonable time must be decided by the court in view of the circumstances of each particular case. In one case it might only be a few days and in another a few weeks. Presentment may be made to the drawee or his agent at his place of business during business hours, or at his residence at any reasonable hour.

**Letter of Credit.**—Sometimes an agreement is made beforehand to accept drafts when they are drawn. This is in effect an acceptance, and will be considered in law as such whether acceptance is given or not. The most frequent use of this kind of an agreement is in what is called a letter of credit used by European tourists. A letter of credit for a certain amount is taken by the traveler, and this being an agreement of a reliable firm to pay drafts drawn by the holder to a certain amount, enables him to draw any amount he may need, up to a certain sum, in the different countries he visits, thus saving the trouble of carrying the money with him and changing from one kind to another. As money is drawn the amount is indorsed on the letter, so any one to whom it is presented can see that the amount to which it entitles the holder is not overdrawn. Letters of credit are generally not negotiable.

**Negotiability.**—The bill of exchange is the oldest form of negotiable paper. It can be transferred the same as a note and possesses the same quality of being binding in the hands of a holder in good faith for value without regard to whether it was originally good. It may be transferred at any time before due, either before or after being accepted.

### QUESTIONS.

Define bill of exchange. Distinguish between it and a note. What is said of the use of drafts, (1) in paying debts, (2) in collecting debts? What are foreign bills generally? in the United States? In what cur-

rency payable? What is an inland bill? What are the parties to a bill called? What are sight drafts? time drafts? What is acceptance? effect of? Give the liability of the different parties to a draft, before acceptance; after acceptance. What is said of presentment for acceptance? What is a letter of credit? Give its use. What is said of the negotiability of a bill of exchange?

## CHAPTER XIV.

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### CHECKS.

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**Definition.**—A check is a draft or order drawn on a bank or banker, by a person who is supposed to have funds on deposit there, payable on demand, without grace. It is in most respects like a bill of exchange, but differs from it in that it is always, and must necessarily be, drawn upon a bank or banker, and is always payable on demand and without grace. A check is always supposed to be drawn against funds previously deposited in the hands of the bank for the purpose of being checked out. The parties to a check are the same as those to a draft, viz.: drawer, drawee, and payee, the drawee always being a bank.

**Use.**—It is unsafe and very inconvenient for a business man who receives and pays out very much money, to handle the money itself all the time. The money can be deposited in a bank subject to check, and whenever there is an occasion to pay any out, an order on the bank specifying the exact amount is given the party to be paid. This being paid by the bank, there is never any inconvenience in making change, and the money is always safe in the vaults of the bank. There is also another very great advantage in this way of handling money. Whether a check is payable to order or to bearer most banks require the payee to sign his name on the back before they will cash it. This check coming back to the drawer with the payee's name on the back, and marked paid, is a receipt from the payee for the amount of money which it calls for.

**Form.**—In form the check differs a little, and but little, from the bill of exchange. The address of the drawee instead of being placed in the lower left-hand corner is usually written in large letters at the top and in the center. As the check is always payable on demand it says nothing about the time the money is to be paid. Books containing blank checks are furnished by the bank to those who have money on deposit and the checks are filled out as needed. The following is a common form of check as it appears after being filled out:

## BANK CHECK.

$\$24 \frac{50}{100}$	Salina, Kansas, <i>July 1, 1892.</i>
THE AMERICAN NATIONAL BANK,	
Pay to the order of <i>C. H. Kame,</i> ~~~~~	
<i>Twenty-four and</i> $\frac{50}{100}$ ~~~~~ DOLLARS.	
No. 15.	<i>L. O. Thoroman</i>

**Negotiability.**—Like the note and the bill of exchange, the check may be either negotiable or non-negotiable. If it conforms to all the conditions of negotiability given in a previous chapter it is negotiable, and can then be transferred by indorsement or delivery like so much money, the only thing to prevent its being freely accepted as such being doubt of the drawer's responsibility.

**Liability of Parties.**—As in the case of a bill of exchange, the drawer impliedly contracts with the payee and indorsees that he has funds on deposit with the bank on which it is drawn, and that on being presented there the check will be paid. This of course the bank will always do if the drawer has money on deposit, and if he is perfectly responsible financially it will sometimes cash his checks when he has no money there, reimbursing itself when he again has money on deposit. If the bank refuses to pay a check it cannot generally be sued by the holder, even if the drawer has money on deposit, but in case of such refusal the drawer immediately becomes responsible, and can be sued on the check if he is given the proper notice of the bank's refusal.

**Presentment.**—While the check is negotiable and can very readily, and as a matter of fact does circulate to some extent as money, it is not intended to so circulate. Since it is payable immediately it is the duty of the holder to present it to the bank for payment within a reasonable time after receiving it. Just what is a reasonable time depends upon circumstances. If the holder receives the check in the same town where the bank is located, he has all of the next day after receiving it in which to make presentment. If the bank is in a different town, he has all of the next day in which to mail it to someone there for presentment. The fact that the check is not presented within a reasonable time will not, of itself, release the drawer from his liability. He must first show damage to himself by reason of the delay. If the bank remains solvent, any amount of time can elapse without discharging the drawer from his liability; but if after a reasonable time has elapsed, the bank should

fail before the check is presented, the holder will be the loser, provided the drawer had money on deposit to meet it.

**Certification.**—Checks furnish a very convenient method of paying debts, but they cannot always be safely accepted instead of money, because there is nothing to prevent one from drawing a check on a bank in which he has no funds on deposit. On this account business men, before they will take a check from a stranger, frequently require that it be “certified.” Again it is frequently desirable that a check be transferred from one person to another like money, but before one can safely accept a check he must have some assurance that it will be paid. This can only be given, if he does not know the financial standing of the drawer, by certification. Certification is to a check much the same as acceptance to a draft. A person who wishes to have a check certified presents it to the proper officer of the bank, and if the drawer has money on deposit the officer writes or stamps across the face of the check the word “good,” or something which means the same, and signs his name. The bank from that time becomes responsible for its payment the same as an acceptor on a draft, and this is true whether the drawer had any money on deposit or not, and even if the check is forged. On certification of a check the amount is taken from the depositor’s credit on the books of the bank, the same as if it had been paid out, otherwise it might be checked out again before the certified check is presented for payment, and the bank thus be compelled to pay it twice. The principal difference between certification of a check and acceptance of a draft is that in certification the drawer is released from liability, whereas the acceptance of a draft does not so release him.

**Forged Checks.**—When a person opens up an account with a bank by depositing money subject to check, the bank requires him to write his name in a signature book, just as it will be signed to his checks. This is done in order that the bank may be able to tell whether the signatures to checks presented are genuine, by comparing them with the signature in the book. It is the duty of the bank to know the signature of every one of its customers, and if by a failure to do so it pays a check that is forged, the bank alone is responsible. If a genuine check is changed by having the amount raised, and the bank pays it, only the original amount can be charged to the drawer, unless by his carelessness in drawing the check he made it possible for the change to be made without detection. In that case he must bear the loss.

**Certificate of Deposit.**—It often happens that a person who keeps no regular account at a bank wishes to deposit money for safe keeping for a short time. It is customary for the bank in such cases to receive the money and give the depositor a certificate of deposit or cashier’s

check. The certificate of deposit certifies that the person has deposited in the bank to the credit of himself a certain sum of money, payable on presentation of the certificate properly indorsed. It is dated and signed by the cashier or teller.

**Cashier's Check.** — The cashier's check is a check drawn in the usual form by the cashier or teller in his official capacity upon his bank for the amount deposited, and payable to the order of the depositor. Both the certificate and the cashier's check are negotiable and transferable in the same manner as other negotiable paper. Either is in effect a certified check, consequently the money which it represents cannot be checked out by the depositor, because if the bank should allow the money to be taken out in this way it would be compelled to pay it again on presentation of the certificate or cashier's check.

### QUESTIONS.

Define check. Distinguish between check and draft. What are the parties to a check called? How is the check used? What is said of its convenience and safety? In what does the form of a check differ from that of a bill of exchange? What is said of its negotiability? What is said of the liability of the parties to a check? When must a check be presented for payment? Give the effect of a failure to so present it. What is certification? Give its object and effect. What difference is there between certification of a check and acceptance of a draft? What will be the effect if a bank pays a forged or raised check? How can the bank tell if a check is genuine? What is a certificate of deposit? a cashier's check?

## CHAPTER XV.

### TRANSFER.

**Assignment.**—At common law a chose in action, that is, a claim which can be enforced by a suit at law, could not be transferred so as to enable another to enforce it in his own name. This, however, has generally been changed by statute so that now all claims, except a few that are prohibited from being transferred, can be transferred and suit brought in the owner's name. A non-negotiable note being simply written evidence of a claim can be transferred unless it is given for a claim that is not transferable. This transfer is called an assignment, and may be made orally or by written statement of the intention to transfer on the instrument itself or a separate paper.

**Indorsement.**—The word indorsement means literally writing on the back, and in this sense any instrument of indebtedness can be indorsed. The word, however, is used in a technical sense and means the writing of one's name on the back of an instrument with intent to incur a peculiar conditional liability. In this sense the term is applied only to negotiable paper. Indorsement is simply a contract by which the holder of a negotiable paper agrees to transfer the title to the instrument, and on certain conditions, which are discussed further on, to become responsible for its payment. Being a contract, it must be supported by a consideration. The term indorsement includes also the idea of delivery, since the title to the instrument is not transferred until after delivery. An indorsement is necessary to transfer the title only in case of those instruments which are made payable to order, but an instrument made payable to bearer can be indorsed.<sup>1</sup>

**Who May Indorse.**—Any one who holds the legal title to a negotiable instrument and is capable of making a binding contract can make an indorsement. If the instrument is payable to bearer, any one in whose possession it comes can indorse it, if he is capable of contracting, even if the instrument is found or stolen. If a note is payable to some one who is not capable of contracting, like a minor or lunatic, he can

<sup>1</sup> In Illinois and Alabama, indorsement is necessary to pass the legal title to paper payable to a designated person or bearer.

by indorsement pass a good title against any one but himself, but he cannot by that act deprive himself of the right to the paper. He can at any time avoid the indorsement and recover the paper. If the paper is payable to a partnership it can be indorsed by any member of the firm, but only in the firm name.

**Liability of Indorser.**—The indorser by the act of indorsement, impliedly contracts with his indorsee and with every subsequent holder, (1) that the instrument itself, including all the signatures before his own, is genuine; (2) that all the parties are competent to contract; (3) that he has a good title to the paper; (4) that the paper is not invalid because its execution violates some law; (5) that the paper will be paid when due on presentation to the proper party. In case of a breach of any of these warranties, except the last, the holder can proceed at once against the indorser, without making any demand on the original parties, but in case of a breach of the last, demand of payment must be made on the original party, and the indorser notified of the refusal.

**Methods of Indorsing.**—There are several ways of indorsing negotiable paper in common use in business transactions, the most important of which are, (1) in full, and (2) in blank, either of which may be (3) without recourse, and (4) restrictive indorsements.

#### FORMS OF INDORSEMENT.

<p>(FULL INDORSEMENT.)</p> <p><i>Pay to the order of</i>  <i>W. D. Struble.</i>  <i>C. H. HARVE.</i></p>	<p>(BLANK INDORSEMENT.)</p> <p><i>W. D. STRUBLE.</i></p>	<p>(INDORSEMENT WITHOUT RECOURSE.)</p> <p><i>Without recourse.</i>  <i>L. L. WALKER.</i></p>	<p>(RESTRICTIVE INDORSEMENT.)</p> <p><i>Pay to the First National Bank for collection.</i>  <i>JOHN O. WILSON.</i></p>
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**Indorsement in Full.**—By a full indorsement the indorser directs the payment of the instrument to be made to a particular payee. He does it by writing across the back of the paper “Pay to C. D. or order,” or words to that effect, and signing his name underneath the words. This is the safest indorsement, because if the paper is lost or stolen it cannot be again transferred without the signature of C. D. It is therefore the method generally adopted to guard against loss of the paper in transmitting it from place to place.

**Indorsement in Blank.**—When the indorser writes his signature only, across the back of a note or bill, it is said to be indorsed in blank.

After the person named as payee has thus indorsed it, the instrument is transferable by delivery the same as though payable to bearer, and may be transferred any number of times without further indorsement. Where a note or bill is indorsed in blank, a subsequent holder may write over the indorsement words making it payable to himself, thus making it a full indorsement. After this it can only be transferred by indorsement. If a bill is once indorsed in blank subsequent indorsements in full will not prevent its being payable to bearer as long as the blank indorsement is not filled up, since any one into whose hands it comes can make it payable to himself by filling up the blank indorsement.

**Indorsement Without Recourse.**—It sometimes happens that a payee or indorsee wishes to transfer a negotiable instrument, payable to order, without assuming the liability of an indorser. Since he can only transfer it by indorsement, he writes on the back of the note the words “without recourse” and signs his name underneath. By this form, called indorsement without recourse, he conveys the title, but expressly refuses to be responsible. No subsequent holder can have any claim on him, because of the refusal of the original party to pay the bill or note. As we have seen, however, the indorser contracts with the indorsee on five different points, of which payment is one. An indorsement without recourse relieves him from liability only on this one point, holding him responsible for all the others the same as an ordinary indorsement; that is if the note is a forgery; if any of the parties are incompetent to make contracts; if the indorser has not a good title; or if the note is invalid because of having been given in violation of law, the indorser without recourse is responsible. Either the blank or the full indorsement may be made without recourse.

**Restrictive Indorsement.**—It is sometimes desirable to transfer negotiable paper to another for some purpose, like collection, and at the same time prevent him from further transferring it. This can be done by what is called a restrictive indorsement. In this case the indorser writes on the back of the instrument “Pay to B only” or “Pay to B for collection.” An indorsement like this is notice to all that the instrument is simply held in trust so that the legal title cannot be transferred. The holder by this kind of indorsement, in case the maker refuses to pay, cannot bring an action on the note in his own name, but only in the name of the person for whom the collection is to be made.

**Time of Transfer.**—The time at which negotiable paper is transferred has much to do with the rights of the holder. As we have seen, the holder of negotiable paper in good faith, for value, has an absolute

right to enforce payment, without regard to the rights of the one from whom he obtains it. This is true, however, only in case it comes into his possession before maturity. The fact that paper is past due and unpaid is enough to arouse suspicion of its validity in the mind of any one to whom it is offered. If he takes it then he must take it subject to all the defenses that might have been set up against it in the hands of the one from whom he obtained it.

### QUESTIONS.

Define assignment. What may be assigned? Define indorsement. To what is it applied? When is indorsement necessary? Who may indorse a negotiable instrument? What effect has the indorsement of a minor? How must a partnership indorse? Give the liability of an indorser. What methods of indorsing are there? What is an indorsement in full? its effect? in blank? without recourse? Give the liability of an indorser without recourse. Give object and effect of restrictive indorsement. What has the time of transfer to do with the rights of the holder?

## CHAPTER XVI.

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### DEMAND AND NOTICE.

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**Necessity.**—In order to hold liable the drawer and indorsers on a bill, and the indorsers on a note, it is necessary to demand payment of the maker on the day of maturity, and notify these parties of his refusal. They are liable only on condition that they have immediate notice of the fact that the maker or acceptor refuses to pay, and that they are to be looked to for payment. Demand on the day of maturity is not necessary in order to hold the maker and acceptor; they are responsible if the bill or note is presented at any time before it becomes outlawed.

**Excuses for Non-Presentment.**—There are some circumstances, however, which will excuse a failure to make presentment for payment on the day of maturity, and still hold the drawer and indorsers. Any condition of affairs which makes presentment impossible or very inconvenient will excuse a failure, as long as the impossibility continues. If the residence of the maker or acceptor is unknown, and by the exercise of reasonable diligence cannot be found, or if he has moved into another state, presentment is unnecessary. If the maker or acceptor should die and administrators have not been appointed on the day of maturity, it will be sufficient to go to his residence with the paper. No one being there to pay, it will be considered as dishonored. Sickness and death of or injury to the holder, happening so shortly before maturity that provision for presentment on the day of maturity cannot be made, will be a sufficient excuse, provided presentment be made as soon after maturity as possible. So also an agreement on the part of the drawer or indorser that presentment is not necessary will excuse failure.

**Where and to Whom.**—If the place of payment is named in the instrument, demand must be made there. If no place of payment is named, then demand should be made at the residence or place of business of the maker or acceptor. On the street is not a good place to make presentment, but if the maker or acceptor is met on the street, and the paper presented to him there for payment, it will be a good demand, unless he objects because of the place. The demand should be made on the maker or acceptor, if it is possible to find him. In case of death of the one who is to make payment, demand must be made of

his executor or administrator, if one has been appointed. It is the duty of everyone to make provision to meet his obligations as they become due, and if the maker or acceptor cannot be found at his residence or place of business, demand may be made of any one found at either place, who has arrived at years of discretion.

**When and by Whom.**—Demand must be made on the day of maturity, that is on the last day of grace, unless there exists a valid excuse for failure. If made at the place of business of the maker or acceptor, it should be made during business hours, although if someone authorized to pay is found there after business hours, and demand made of him, it will be good. If made at his place of residence, it should be at a reasonable hour, when one is expected to receive visitors. If, however, the person making demand is received, and allowed to present the paper for payment, it will be good at any hour. Demand may be made by the holder of the paper or his authorized agent, or by any one in whose hands it is for collection.

**Manner.**—No particular formalities are required in making presentment, but the paper itself should be exhibited so that the promissor can inspect it, if he so desires. If an actual exhibition of the paper is not made, demand should be accompanied by some statement or indication that the paper is in the possession of the party making presentment, so that it can be seen if desired. Many notes are made payable at a bank or at the office of a certain person, and where this is the case all that is necessary, in the way of demand, is that the note be at that place on the day of maturity. It is then the duty of the maker to come there, and if he wishes to see the note he must make a request to that effect.

**Payment.**—If the maker of a note or acceptor of a bill pays it, the drawer or indorsers are immediately released from all further liability on account of it. Payment must, of course, be made to the one having title to the paper. If, however, it is made payable to bearer, payment made to one having the paper in his possession, even though he has not a good title, will discharge the maker unless he knew he was paying to one not entitled to payment. If the paper is payable to order, payment to any one not having the title to the paper will not release the maker. Payment should never be made until the paper is due, unless it is surrendered and cancelled; because if it should afterwards, and before maturity, get into the hands of a holder in good faith for value, it could be collected again.

**Protest.**—In case payment of a note or bill has been demanded and refused, it becomes necessary to have some evidence of this fact, should the drawer or indorsers have to be sued. If the parties all live in the same place, the fact of the demand and refusal can be easily established

by witnesses, but in case of a foreign bill of exchange this is very difficult, and sometimes practically impossible. On this account the law requires that all foreign bills must be protested, either for non-payment or non-acceptance, or the drawer and indorsers will not be responsible. The protest is a formal declaration in writing, by a notary public, of the demand and refusal to pay. The notary takes the bill himself and demands payment in order that he may speak from his own knowledge of the refusal, and then writes out a statement that he has presented and demanded payment of the bill, and that payment has been refused, giving the place and date, and that he protests against the drawer and indorsers of the bill. The notary then sends written notices of the protest to the drawer and indorsers. He also makes a statement in the protest itself of this fact of notification, giving names of the parties notified, and the manner of giving notice. He then affixes his name and seal to the paper, and the protest is complete. It is then attached to the bill and kept by the holder as evidence of the protest. The protest should be made on the same day on which payment is demanded and refused, which, of course, is the day of maturity. If the drawee of a foreign bill refuses to accept it when presented, the same protest is necessary with the change in form to show that it is protested for non-acceptance.

## FORM OF PROTEST.

State of Illinois, } ss.  
COUNTY OF COOK, }

*I, Myron T. Bly, a Notary Public in and for the county aforesaid, Do Hereby Certify, that on the 27th day of June, in the year of our Lord one thousand eight hundred and ninety-two, at the request of the Chicago National Bank, I did present the original bill, which is hereunto annexed, at Chicago, Ill., and demanded payment of the acceptor thereof, which was refused.*

*Whereupon, I, the said Notary, did Protest, and by these Presents do publicly and solemnly Protest, as well against the drawer and indorsers of the said bill as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interest, already incurred or to be hereafter incurred, for want of payment of the said bill.*

*And I do Further Certify, that on the same day and year above written, due notice of the foregoing Protest (by notice partly printed and partly written, signed by me) was given to the drawer and the several indorsers thereon by depositing notices in the post office at Chicago, Ill., postage paid, directed as follows:*

*D. D. Knettles, Springfield, Ill.*

*Hunt & Helm, Harvard, Ill.*

*Henry French, Milwaukee, Wis.*

*Felix J. Griffin, Hyde Park, Ill.*

*Each of the above-named places being the reputed place of residence of the persons to whom the notice was directed, and the Post Office nearest thereto.*

*Thus Done and Protested, at the city of Chicago, Ill., the day and year first above written.*

[*L. S.*] *In Testimony Whereof, I have hereunto set my hand and affixed my seal of office.*

MYRON T. BLY,

*Notary Public.*

**Notice of Non-Payment.**—Although formal protest by a notary public is not necessary on a promissory note or an inland bill, it is necessary that the drawer and indorsers be notified of the non-payment or non-acceptance. No particular form is required in giving the notice. It need not even be in writing, although it is better to give a written notice, since in that case it is much easier to prove that notice has been properly given. All that is necessary is, that the notice show the fact that presentment and demand of payment or acceptance has been made and refused. It may be given by a notary public, and in that case his certificate will be evidence that it has been properly given, but in the majority of cases it is given by the holder of the note or bill.

#### FORM OF NOTICE.

*Chicago, Ill., June 27, 1892.*

*To Messrs. Hunt & Helm.*

#### **Please Take Notice:**

*That a certain bill of D. D. Knettles for one thousand dollars, payable sixty days after sight, dated April 15, 1892, drawn on and accepted by Elwood S. Jones, and indorsed by you, was this day presented for payment, and payment having been demanded and refused, the holder looks to you for the payment thereof.*

MYRON T. BLY,

*Notary Public,*

*At Chicago National Bank.*

*It is desirable that you notify your prior indorser, if any.*

**Service of the Notice.**—Where the parties all live in the same place, the drawer or indorsers must be notified on the day demand is

made, or the following day. If they do not live in the same place, so that the notice must be given by mail, it must be deposited in the post-office in time to be taken by the mail leaving on the day after demand and refusal. A failure to so notify relieves, of course, the drawer and indorsers from their obligation. The holder need only notify the indorser immediately prior to himself, if he is willing to depend entirely on him for payment. It is customary and better to send notices to all. Each indorser has one day after receiving notice in which to notify the indorser prior to himself.

**Waiver of Notice.**—It frequently happens that the holder of a note does not desire to have the trouble of sending notices, nor the risk of loss from a failure to give the notice at the proper time. Or it may be desired to save the expense of protesting. This can be done by an agreement, either written or oral, to waive protest and notice of non-payment. Frequently an agreement of this kind is printed on the blank on which the note is written, and where this is the case all who indorse it are bound by the agreement and are not entitled to notice. Such agreements are usually in the body of the note like the following form:

FORM OF WAIVER OF NOTICE.

*The indorsers hereon hereby waive protest and notice of non-payment.*

QUESTIONS.

What is said of the necessity of demand? What will excuse it? Where must demand be made? to whom? when? by whom? What is said of the manner of making presentment? What effect has payment? To whom must it be made? What is protest? where necessary? give process of making. Where is notice of non-payment necessary? how may it be given? when? What is a waiver of protest and notice? How is it given?

## CHAPTER XVII.

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### GUARANTY AND SURETYSHIP.

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**Definition.**—A surety or guarantor is one who agrees to become responsible for the debt or default of another ; that is, to pay damages in case the other does not perform his obligations. There is a slight distinction between the two, but it is not of sufficient importance nor sufficiently plain, to admit of discussion here. We shall consider them both as falling under the same definition. A guaranty, being a contract, must, of course, have all the necessary conditions of a contract, but the definition implies the existence of a principal contract to which the guaranty is merely collateral. For example A owes B a certain sum of money; this constitutes the principal contract. C agrees with B that he will pay the debt if A does not; this is the collateral contract—the guaranty. It is evident from this that there must be at least three parties to every guaranty, the principal debtor, or the one who is primarily responsible, the creditor, or the one to whom he is responsible, and the guarantor or surety. A guaranty, being an agreement to answer for the default of another, must be in writing according to one of the provisions of the Statute of Frauds.

**Kinds of Guaranties.**—Guaranty is a very common kind of contract. It includes all such agreements as sureties and indorsements on negotiable paper, and all bonds given for the faithful performance of some duty, such as are required of clerks in banks, treasurers of corporations, public officers, etc. The guaranty with which we deal principally in this book is for the payment of money, and of this class there are three kinds in general use ; viz., guaranty of payment, guaranty of collection, and continuing guaranty.

**Guaranty of Payment.**—This is a kind of guaranty very much used. By it the guarantor engages unconditionally that if the debtor does not pay the debt he will pay it himself. If he wishes to guarantee the payment of a note, he simply writes on the back something like this, “For value received I hereby guarantee the payment of this note” and signs his name ; or he simply signs his name on the face of the note, usually below that of the maker, with the word surety after it. By this, payment is absolutely guaranteed, and the surety or guar-

antor becomes liable for the amount immediately on the refusal of the debtor. Nor is he entitled to prompt demand and notice of refusal like an endorser. If he can show that, by the creditor's failure to make demand of the debtor on the day of maturity, or by his failure to send notice of refusal, he has suffered actual loss which he might otherwise have avoided, then he will be relieved from his liability; but unless he can show this he will be held. It is, however, always best to send notice to sureties and guarantors within a reasonable time after refusal.

**Guaranty of Collection.**—In this form of guaranty the guarantor writes on the back of the note, "For value received I hereby guarantee the collection of this note" and signs his name. These two forms of guaranty differ considerably in their legal effect. The former is an agreement that the maker of the note will pay it when due, and in case he fails to do so that the guarantor himself will pay it. In the latter, however, the guarantor agrees to pay the note in case the holder cannot collect the amount due from the maker. This places upon the creditor the necessity of first showing his inability to collect. He cannot do this by merely making a demand, and accepting as conclusive the debtor's refusal to pay or his statement of inability to do so. He must, as a rule, sue the debtor, and attempt to enforce payment by the regular legal means. A judgment against him, and the return of an execution thereon unsatisfied, is usually held to be sufficient evidence of inability to collect from the debtor, to compel payment from the guarantor. The creditor must not unnecessarily delay proceedings against the debtor, since a loss of the claim through his negligence would release the guarantor. Having failed to get anything from the debtor, he may proceed to collect from the guarantor, and in addition to the amount of the note he can collect whatever costs he has had to pay in his attempt to enforce payment from the debtor.

But suit is not always necessary. If the debtor before maturity of the note removes from the state, leaving no property which can be taken on execution, the holder may proceed at once to enforce payment from the guarantor. Guaranties in these words, "I warrant this note good," and like expressions, are in effect guarantees of collection, and the holder must show that collection is impossible before he can require the guarantor to pay.

**Continuing Guaranty.**—This form of guaranty is given for the purpose of securing the payment of debts made at different times after the guaranty is given. For example E. W. Ober writes and delivers to the H. D. Lee Mercantile Co. the following:

*"For value received, I hereby guarantee the payment of the purchase price of all goods that may be hereafter sold to J. F. Henning by the H.*

*D. Lee Mercantile Co. upon the usual terms of credit, to the amount of five thousand dollars, for which payment this is designed as a continuing guaranty."*

*July 1, 1892.*

*E. W. OBER.*

This is a continuing guaranty. It will furnish security to J. F. Henning for all purchases from the H. D. Lee Mercantile Co. up to the amount stated in the agreement. Nor will it be extinguished as soon as the amount is reached. He can, after purchasing to the full amount, pay off a portion and the guaranty can then be used again up to the limit.

**Consideration.**—Where the guaranty is made at the same time with the principal contract, one consideration will support both. If A borrows money of B, and C signs the note as security, B is induced to let A have the money by the promise of C to be responsible for its payment, and after C has thus, by his promise to be responsible, induced B to advance the money, the law will not permit him to refuse performance. If the guaranty is made after the principal debt, it cannot be on the strength of it that the money is advanced. C's promise in that case must have a consideration to support it, and it is customary in such cases to pay one dollar, or some such nominal sum, to make the promise binding.

**Creditor's Rights.**—The creditor's rights in the contract of guaranty depend, of course, on the terms of the contract. He can do nothing until the principal debtor is in default. As soon, however, as default is made he is entitled to proceed at once against the surety or guarantor, and enforce the performance of his obligation, whatever it may be.

**Surety's Rights.**—*Against Creditor.*—The most important of the surety's rights against the creditor is what is known as subrogation. If the surety is compelled to pay the claim against the principal debtor he is entitled to all the means which the creditor possesses to enforce payment. That is, he is entitled to stand in the place of the creditor and have all the securities transferred to him with the right to enforce them. If the surety has mortgaged his property with that of the principal debtor, he is entitled to have the debtor's sold first, and the proceeds of the sale applied to the payment of the debt, before taking his own.

*Against Debtor.*—So long as the principal debtor is not in default, the surety has no rights against him by reason of their relationship. The moment, however, that default occurs the surety may discharge the debt and proceed at once to collect from the principal, and he may recover not only the amount of the debt and interest but all costs he may have been compelled to pay. If the surety is disposed to do so, of

course he can wait until he is forced by the creditor to pay the debt, and then compel the principal debtor to reimburse him.

**Co-Sureties.**—Where several sureties unite in a guaranty, each one enters into the same contract with the creditor, and each is bound to contribute equally with the others to the satisfaction of the debt, if the debtor fails to make payment. If one of the sureties pays the whole debt he may compel the others to contribute their respective shares, and if one is insolvent the others must still bear the burden equally. For example, if there are four sureties and one pays the whole debt he can call upon each of the others to repay to him one fourth of the amount advanced, and enforce such repayment by action; but in case one should be insolvent, then the other two would each be obliged to contribute one third of the sum advanced. This is known in law as the right of contribution between co-sureties. Where one of several sureties takes from the principal debtor a mortgage to indemnify him against his liability, the co-sureties have an interest in the security so taken; and in case of the principal debtor's default such security must be applied to the reduction of the liability of all. The right of contribution exists only where there is nothing in the agreement to alter their relations. If the last surety adds to his signature, "surety for the above names," or words to that effect, he does not become a co-surety, and if he should pay the debt he could compel the others to reimburse him for all he had to pay. On the other hand if one of the others pays it, the one who has signed his name in this way cannot be compelled to reimburse him for any share of the debt.

**Discharge of Surety.**—There are several ways in which a surety may be discharged from liability. In case of a continuing guaranty the most important of these are, (1) expiration of time, and (2) notice from the guarantor. In case of guarantors to single contracts, like sureties on bonds, notes, etc., the most important are, (1) alteration of the agreement, (2) giving time to the principal, and (3) fraud practiced upon the guarantor.

**Expiration of Time.**—A continuing guaranty is sometimes given for a definite time, as one year or six months; and in such cases it is extinguished by the expiration of the time specified. This, of course, only relieves the guarantor from responsibility for new debts. He is still responsible for the payment of all debts made within the time during which the guaranty was in force.

**Notice from Guarantor.**—When a continuing guaranty is given for an unlimited time, it may be terminated by notice to the creditor from the guarantor, and in case it is so determined the effect is the same as where it occurs by expiration of time. The guarantor is held

for all debts made before the notice was given, but not for those made after. Even where the guaranty is given for a certain time, the guarantor, by giving notice, can terminate it unless he has received a consideration for the use of his credit.

**Alteration of Agreement.**—Any change in the agreement by interlineation or erasure made by the creditor and principal debtor, without the consent of the guarantor, will discharge him from his liability under it. Such alterations have the effect of creating a new and different agreement, consequently the surety can be held responsible on this only by his own consent.

**Giving Time to Principal.**—This is in effect a change of the agreement, and if made without the surety's consent will discharge him from his liability. However, it requires something more than a mere promise on the part of the creditor to wait on the debtor, to discharge the surety. It requires a valid agreement to extend the time. The creditor may promise the debtor to give him a little more time in which to meet his obligation, but this promise, being without consideration, is not binding. Notwithstanding this promise, the creditor can bring suit against the debtor immediately. Such a promise as this will not discharge the surety. If, however, the debtor should pay a part of the debt before it becomes due, and in consideration of this payment the creditor should extend the time of payment of the balance, this agreement, being binding on the creditor, would discharge the surety if made without his consent. Blanks used by banks in making out notes frequently have printed in them a statement that the sureties waive their right to be discharged by reason of extension of time, and in such cases the surety is still held, although time of payment is extended by a valid agreement.

**Fraud on Guarantor.**—Any fraud practiced on the guarantor by the creditor or by the debtor with the creditor's consent, which induces him to become guarantor, will release him from his obligation. Also, if the principal contract is fraudulent and can be avoided on that ground, the surety is not held liable for its payment.

#### QUESTIONS.

Define guaranty ; give example ; what are the parties to a contract of guaranty ? What kinds of guaranties are there ? What is guaranty of payment ? What can you say of the necessity of making demand and notifying the surety of non-payment. What is guaranty of collection ? Under what circumstances is a guarantor of collection liable ? What is a continuing guaranty ? Give liability of such a guarantor. What is said of consideration in guaranty ? What is said of the cred-

itor's rights in guaranty? the sureties' rights against the creditor? against debtor? What is the right of contribution? Where does it exist? How may a surety be discharged from liability? What is said of surety being discharged by expiration of time? When the guaranty is terminated by notice from guarantor, what is the effect? Why will alteration of agreement, without consent of guarantor, discharge him from liability under it? What is said of giving time to principal? of fraud on guarantor?

## CHAPTER XVIII.

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### INTEREST AND USURY.

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**Interest** is a compensation paid for the use of money. The sum of money loaned is called the principal, and upon this sum the interest is reckoned at a certain rate per centum, usually abbreviated to per cent., which means by the hundred. When no time is specified in the agreement, the law will presume that the rate mentioned is by the year, but it is usual in formal contracts to specify the rate at a certain rate per annum; hence where money is loaned at six per cent., it means that the lender is to receive from the borrower six dollars per year on each hundred loaned.

**Legal Rate.**—The statutes of all the states provide that in case there is a legal agreement to pay interest, but no rate is mentioned, then a certain rate shall be paid. This rate, so fixed by the statutes in each state, is called the legal rate, and is the rate which can be collected when no rate is specified and there is an agreement to pay interest.<sup>1</sup> Of course, where there is no law to the contrary, parties can agree on any rate of interest they please, and the rate being specified in the contract, can be collected.<sup>2</sup> In many states, however, provision is made by law that nothing above a certain rate can be collected, even if it is agreed

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<sup>1</sup> In Illinois and Louisiana the legal rate is five per cent. It is six per cent. in the following states: Arkansas, Connecticut, Delaware, District of Columbia, Indiana, Indian Territory, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, and West Virginia. Seven per cent. in the following: Arizona, California, Georgia, Minnesota, Nebraska, Nevada, North Dakota, Oklahoma Territory, South Carolina, South Dakota, and Wisconsin. Eight per cent. in Alabama, Colorado, Florida, Oregon, and Utah. Ten per cent. in Idaho, Montana, and Washington. Twelve per cent. in Wyoming.

<sup>2</sup> The following states have no law limiting the amount of interest that can be taken: Arizona, California, Colorado, Connecticut, Maine, Massachusetts, Montana, Nevada, and Rhode Island.

upon, and this rate is known as the maximum rate.<sup>1</sup> Where such a rate is established by law the parties can agree upon any rate up to this, but agreements to pay a higher rate of interest than this maximum rate are void.

**On What Allowed.**—Claims on which interest can be collected may be divided into two classes; (1) those in which it is provided for and agreed to be paid, in the contract; (2) debts which have become due and remain unpaid. Contracts containing a provision for the payment of interest embrace nearly all loans made in the ordinary course of business, such as promissory notes, bonds, etc., which contain such expressions as “with interest” or “with use” and either naming or omitting the rate; all such expressions in a contract amount to an absolute agreement to pay interest, either at the legal rate or the rate specified. The second class includes notes in which there is no agreement to pay interest, book accounts, and debts of all kinds, however they may arise, after they become due. If a man has money in his possession belonging to another which is legally due, and he neglects to pay it, the law will imply a promise on his part to pay interest at the legal rate for the time during which the money is thus illegally held. This, however, is sometimes held not to be interest, strictly speaking, but damages for nonpayment of the money when due, which the law fixes at the legal rate. This distinction, however, is not important since it amounts to the same thing whether it is paid as interest or as damages.

**Usury** is the taking of more interest for the use of money than the law allows. In order to be usury there must, therefore, be a contract for the use of money, which may be by a loan or by the continuance of an existing debt. In those states which provide a maximum rate of interest the taking of more than this maximum rate is usury within that state; but since this maximum rate is not the same throughout the country, a rate is often usurious in one state and legal in another. Where no maximum rate is specified by law any rate may be taken which is agreed upon, and in that state there can be no usury. If it can be shown that, as a matter of fact, a rate higher than the law

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<sup>1</sup>The maximum rate is six per cent. in the following states: Delaware, Kentucky, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, Tennessee, Vermont, Virginia, and West Virginia. Seven per cent. in Illinois. Eight per cent. in Alabama, Georgia, Indiana, Iowa, Louisiana, Michigan, Missouri, North Carolina and Ohio. Ten per cent. in Arkansas, District of Columbia, Florida, Indian Territory, Kansas, Minnesota, Missouri, Nebraska, Oregon, South Carolina, and Texas. Twelve per cent. in New Mexico, North Dakota, Oklahoma Territory, South Dakota, Utah, Washington, and Wyoming. Eighteen per cent. in Idaho.

allows is taken for the use of money, it matters not in what form or under what pretense it is done, and any of the countless devices by which an illegal rate of interest is sought to be taken, does not alter the usurious character of the contract. The sale of any security like a bond or note which is a valid obligation in the hands of the seller, like discounting a note at a bank, even though it is sold for less than its face value, is not usury, since this is not considered as a loan of money but simply a sale of a chattel. A sale of an accommodation note, given for the express purpose of being thus negotiated, at a greater discount than the maximum rate, is usury, since this is simply a loan of money, as is also the discounting of one's own note at more than the maximum rate.

**Compound Interest** is interest on interest, and this cannot be collected unless there is a special agreement to that effect. As to the collection of compound interest when there is an express agreement in advance to pay it, the law is by no means settled. Some courts have held that such agreements are void, while others again consider them valid, provided the rate is not usurious. In loans of money for a long time it is very common to make in addition to the principal note, a number of interest notes or coupons which represent the amount of interest that is to be paid annually or semi-annually according to the agreement, and it is stipulated in these interest notes that they shall draw interest after maturity. This is in effect, an agreement to pay compound interest but such agreements would probably be upheld in nearly all, if not all, the states.

**Penalty for Usury.**—Where the law fixes a maximum rate above which all interest is usurious, some penalty is generally imposed upon the lender who takes usury. There is, however, but little regularity in this penalty in the different states. Some states require only a forfeiture of the interest above the maximum rate,<sup>1</sup> while in others all interest is forfeited,<sup>2</sup> and some even go so far as to forfeit both principal and interest.<sup>3</sup> Others again in addition to these penalties subject the lender to fine and imprisonment.<sup>4</sup> The lender suffers these losses in most instances because the law will not assist him to collect his claim. Ordinarily if the obligation has been paid with usurious interest the

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<sup>1</sup> This is the rule in North Dakota South Dakota, Georgia, and Louisiana.

<sup>2</sup> This is true in Alabama, District of Columbia, Illinois, Iowa, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Oklahoma Territory, South Carolina, Texas, Virginia, and Wisconsin.

<sup>3</sup> This is the law in Arkansas, Delaware, Florida, Minnesota, and New York.

<sup>4</sup> Idaho is the only state in which this is now the law.

borrower cannot recover any part of it, but in some states the law will compel the lender to repay the usurious interest. The student should refer to the statutes of his own state for the legal and maximum rates and the penalties for usury.<sup>1</sup> Although they are given in the notes, they change so often that some of them are likely to be incorrect.

### QUESTIONS.

Define interest; principal; rate per cent. What is meant by legal rate? maximum rate? On what classes of claims is interest allowed? Define usury? what constitutes? What is compound interest? What is said of collecting it? What is said of the effect of agreeing to take usury?

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<sup>1</sup>In the following states the penalty for usury is forfeiture of all interest above legal rate, but it will be noticed that in most of them the legal and maximum rates are the same: Indiana, Kentucky, Maryland, New Hampshire, New Mexico, Ohio, Pennsylvania, Tennessee, Vermont, and West Virginia. In Idaho in addition to fine or imprisonment there is a forfeiture of three times the usury. In Kansas the penalty is a forfeiture of twice the usury. In Michigan the penalty is a forfeiture of all interest, and lack of ability to sue until the bill is due.

## CHAPTER XIX.

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### SALES OF PERSONAL PROPERTY.

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#### GENERAL PRINCIPLES.

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**Property** is the produce of labor; it is anything of value which is susceptible of ownership. The word property, however, is used in two different senses; to indicate (1) the thing itself which the person owns, and (2) the right or interest which a person has in a thing to the exclusion of others; as for example, a farm is said to be property, and the right one has in the farm is said to be his property in it. The latter is the legal technical definition of the term, while the former is the popular understanding of it. Property is divided into two general classes, personal and real.

**Personal Property.**—To give a perfectly logical definition of personal property so as to exactly distinguish between it and real property seems to be impossible. Personal property is generally said to consist of such things as are movable from place to place, as merchandise, live-stock, furniture, etc., whereas real property consists of those things that are fixed and immovable, such as lands, houses, etc. Houses, however, are frequently movable, but are nevertheless generally real property. A house may be built merely as a temporary building with the intention of moving it, or any house may be sold by itself and taken off the land on which it is built. In either of these cases it is personal property. Under the common law all vegetable growths such as trees, grass, and growing crops while attached to the soil were considered real property, but the moment they were severed from the soil they became personal property. Now in most states crops growing from seed sown or planted may be bought and sold or mortgaged as personal property.

**Sales.**—A sale of personal property may be regarded in two ways: (1) it may be defined as the transfer of the title in the thing sold for a price in money; or (2) it may be considered as a contract or agreement for the transfer of the title to the thing sold for a price in money. The latter is the sense in which the term will be used in this book.

The consideration on which the agreement is made must be money, since if it is something else than money the transfer is a barter and not a sale. Sales are divided into two general classes, executory and executed.

**Executory Sales** are those in which the title to the property has not been transferred from the seller to the buyer; there is simply an agreement to make a transfer of it at some future time. It is because of the importance of this division into executory and executed sales that we define a sale as an agreement to transfer the title rather than the transfer itself. If a sale is the transfer of the title then there can be no such thing as an executory sale. If a drover makes a bargain for ten sheep out of a flock of fifty and goes away without selecting them, the title to the sheep has not been transferred. This is an executory sale. Since the sheep do not yet belong to the buyer, if they should die the loss would fall upon the seller. The seller may, if he gets an opportunity, sell the whole flock to someone else at any time before the ten are selected, and the second buyer can hold them against the first purchaser, although the seller can be compelled to pay damages for refusing to deliver the sheep, if any damages can be shown.

**Executed Sales.**—If the drover when he buys the ten sheep designates the particular sheep that he wants, by marking them or separating them from the remainder of the flock, it is an executed sale. By this act of separation or marking, the title to these particular sheep is transferred and they become the absolute property of the buyer. If they are left in the care of the seller he simply keeps them for the buyer, and if they die the loss falls upon the buyer. So also if the seller sells the whole flock, including these marked sheep, to some one else before delivery, the drover can generally claim them wherever he finds them. Some states, however, provide by statute that where property is left in the hands of the seller it is evidence of fraud, and an innocent subsequent purchaser can hold it, although the first buyer can get damages.

**Necessary Conditions.**—The necessary conditions or elements of a sale of personal property are as follows: (1) there must be parties competent to contract; (2) these parties must mutually assent to the contract in the same sense; (3) there must be a consideration or price; (4) there must be subject matter or thing sold; (5) the sale must conform to the statute of frauds.

**Parties.**—The parties to a contract of sale are the buyer and the seller, or as they are frequently called, the vendor, meaning the seller, and the vendee, meaning the buyer. These parties must be competent to make a binding contract. The rule as to the competency of parties

is the same in sales of personal property as in any other contract. The rule, as stated in the preceding chapter, is that all persons whom the law does not disqualify are competent to contract, and consequently may be parties to a sale of personal property. The parties who are disqualified have been enumerated and discussed in a preceding chapter so it is not necessary to again refer to them.

**Mutual Assent.**—This condition is the same as the corresponding condition in an ordinary contract. The parties must assent to the terms of the sale with the same understanding of them. This assent may, of course, be given orally or in writing, and may be either express or implied. In order to make a contract of sale, however, there must be a definite offer to sell on the part of one party, and a definite acceptance of the offer on the part of another. Mere negotiations which do not constitute a distinct offer and acceptance will not be considered a sale.

**Price.**—This condition corresponds to the consideration in an ordinary contract, and differs from it only in that it must be money. It may either be paid at the time of the sale or promised to be paid at some future time. The price may be either express or implied. If the parties distinctly agree upon the amount to be paid, there is an express price. Very frequently, however, it happens that no price is fixed upon at the time of the sale and no express promise to pay is mentioned. Where this is the case, if there is anything from which the price intended can be determined, the law will imply a promise to pay it; for example where the subject matter of the sale consists of articles of merchandise, the law will imply the price to be the reasonable market value of the articles on the day of sale. If there is nothing from which the price intended can be determined there will be no sale.

**Subject Matter.**—The thing sold, or the subject matter, must be legal and in actual or potential existence at the time of the sale. There cannot be a valid contract of sale where the subject matter has ceased to exist, either at the time the contract is made or at the time when it is to be executed. If a horse sold be dead, or merchandise sold be destroyed by fire or otherwise when the contract is made, or when it is to be executed, there is no sale, even though the price be paid. But where a thing is in potential existence, that is, may come into existence in the future, as, for example, the wool to grow on a flock of sheep, or a growing crop, a sale may be made of it.

**Legality.**—The subject matter of the contract must be legal in order to make a binding contract of sale. The legality of the subject matter depends on the same rules here as in any other contract; it is legal unless the law declares it to be illegal, and a sale is always presumed to

be legal until its illegality is shown. At common law the sale of articles having an immoral effect, or to be used for an immoral purpose, such as obscene publications, gambling instruments, etc., was illegal, and this rule still prevails in all the states, unless it has been expressly changed by a statute. In all the states the statutes, in addition to this, expressly provide that the sale of other articles of different kinds shall be illegal, except under certain conditions. For example, restrictions are put upon the sale of intoxicating liquors and poisons in nearly all the states. Whether a sale is illegal or not is determined by the law of the place where it is to be performed.

**Effect of Illegality.**—An illegal sale is absolutely void, hence there can be no ratification of it. If a sale is made of several articles for one price, and part of them are legal and the others illegal, the whole contract is tainted with illegality, and no money can be recovered for any of the articles. If an illegal sale has been executed by either or both parties, the law will not relieve either party from its effect. If the subject matter of the sale has been delivered, the buyer may keep it and refuse to pay the price; if the buyer has paid the price but the subject matter has not yet been delivered, the seller may refuse to deliver. This is because of the general rule that in all illegal transactions the law leaves the parties just where it finds them.

**Statute of Frauds.**—Without a statutory provision to that effect a contract of sale of personal property need not be in writing, in order to be valid; but as we have seen, the Statute of Frauds, as adopted in most of the states, provides that no contract for the sale of goods, wares or merchandise for the price of fifty dollars or upwards is binding, unless (1) the buyer shall accept part of the goods so sold and actually receive the same, or (2) pay part of the price at the time the agreement is made, or (3) the agreement be made in writing and signed by the parties to be charged. Wherever this statute has been adopted a sale of personal property amounting to more than fifty dollars, which does not conform to one of these conditions, is not binding. This section of the statute has been modified in some of the states by changing the amount,<sup>1</sup> and in some the statute has not been enacted at all,<sup>2</sup> so that in them a sale of personal property for any amount is binding, without compliance with any of these conditions.

**Application of the Statute.**—A drover bargains with a farmer for fifty sheep at two dollars per head. There is no sale unless the drover

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<sup>1</sup> See note to page 39.

<sup>2</sup> This section of the statute is not found in Alabama, Arizona, Delaware, Illinois, and Kansas.

takes away some one or more of the sheep, or pays something down, or unless a written memorandum of the sale is made and properly signed. No formal document is required; a simple memorandum like the following is sufficient :

*BRIGHTON, N. Y., July 1, 1892.*

*Bought of Glen King, this day, his flock of fifty sheep at two dollars per head.*

*CHARLES ROBINSON,  
GLEN KING.*

While this is sufficient to comply with the statute, in important sales it is customary to execute a formal bill of sale like the following, in order that the buyer may have something to show his title to the property, and also require that the seller give a written guarantee that he has a good title.

#### BILL OF SALE.

**Know all Men by these Presents:** *That I, JOSEPH STANTON, of the county of Ottawa and State of Kansas, party of the first part, in consideration of the sum of One Hundred Dollars to me in hand paid by CHARLES BUSH, of the county of Ottawa and state of Kansas, party of the second part, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents grant and convey unto the said party of the second part, all of the following described personal property, to wit: all my flock of fifty sheep.*

*To Have and to Hold the same unto the said party of the second part and his legal representatives forever.*

*The said party of the first part hereby covenants and agrees to and with the said party of the second part that he is possessed of the full right and title to the property hereby conveyed and that he will warrant and defend the same in the quiet and peaceful possession of the said party of the second part against the lawful claims of all persons whomsoever.*

*In Witness Whereof, I have hereunto set my hand this first day of July A. D. 1892.*

JOSEPH STANTON.

If both the buyer and seller sign the agreement either can enforce it against the other; if only one signs, he alone can be made to complete the bargain.

**Transfer of Title.**—It is often important to know whether a sale has been completed in order to determine on whom the loss shall fall in case of a destruction of the property, or to ascertain whether the creditors of the buyer or the seller can attach or levy on the subject matter of the sale to satisfy their claims. Whether or not the title to the property has been transferred depends primarily on the intention of the par-

ties. If the circumstances show that the parties intended the sale to be complete, and there is nothing remaining to be done by either party in completing the sale, then the title to the subject matter has passed to the buyer. If anything remains to be done, as for instance the seller is to deliver the sheep to the drover at a place agreed upon, or the sheep are to be selected, or weighed, the sale is not completed until the thing is done. It is presumed in such cases that the parties intended to make the transfer of the title depend upon the performance of the thing yet to be done.

**Delivery.**—The term delivery is used to denote both the transfer of title and the transfer of possession. Properly, however, the word only signifies a transfer of possession, and it is in this sense that it is here used. Delivery may be either actual or constructive. Actual delivery is simply a handing over of the goods by the seller to the buyer. It sometimes happens, however, that the goods are not at the moment in the buyer's possession; they may be in a warehouse, in the hands of a common carrier, or they may be too bulky to be handled readily; in such cases a delivery of a bill of lading, or the key to the warehouse, or anything representing the property is sufficient. This kind of delivery where the goods are not actually handled by the parties is called a constructive delivery.

**Stoppage in Transitu** is a right to control goods that under certain circumstances can be exercised by the seller before there has been a delivery to the buyer. It is the right to regain possession of goods that have been forwarded to the buyer on credit, and then to hold possession of them until the price has been paid. The right may be exercised by the seller provided the following conditions exist: (1) The price for which the goods were sold must be wholly or partly unpaid; (2) they must be in the hands of a third person in transit; and (3) the buyer must be insolvent.

**Indebtedness.**—The sole use of the right of stoppage in transitu is to enforce payment, consequently payment for goods necessarily prevents its exercise; but the mere taking of a note in payment does not affect the right, unless, by agreement between the parties, the note is accepted as absolute payment. Although the price may be partially paid, the goods may be stopped in protection of the part which remains unpaid. The indebtedness must be on the particular goods which are stopped. Any general indebtedness of the buyer to the seller will not allow the stoppage of goods which are paid for.

**In Transit.**—The second condition is that the goods must be in transit from the seller to the buyer. This of course implies that they have left the possession of the seller and have not yet come into the

possession of the buyer, so they are necessarily in the possession of a third person for the purpose of being transported to the buyer. There must not have been either an actual or constructive delivery to the buyer. If this possession is not for the purpose of conveyance, but the third person simply holds them for safe custody as agent of the buyer, and at the buyer's disposal, then the right of stoppage in transitu is lost. It is not necessary, however, that the third person be actually carrying the goods at the time they are stopped; they may be in the carrier's warehouse awaiting transportation, or they may have been carried and be then awaiting delivery to the buyer. So long as they have not left the possession of the third person, the right may be exercised.

**Insolvency of the Buyer.**—This must have occurred or the seller have discovered it after the sale. If the insolvency occurred and is known to the seller before he ships the goods he cannot exercise the right of stoppage in transitu. By insolvency is here meant, not necessarily a technical case of bankruptcy or insolvency, *i. e.*, that the buyer has taken advantage of the bankrupt law or made an assignment for the benefit of his creditors; it will justify the right of stoppage if the seller can show general inability on the part of the buyer to pay his debts. The seller, however, exercises this right at his own peril; if the seller stop the goods when the buyer is solvent, he can be compelled to deliver them, and will also be liable to the buyer for all damage which may have resulted from the stoppage, without regard to whether the seller actually believed the buyer to be insolvent or not.

**Exercise of the Right.**—It is not necessary for the seller to take actual possession of the thing sold when in the hands of a carrier or middleman. It is sufficient for him to give notice to the common carrier to hold the goods subject to his order. The notice should describe the goods, state that the right of stoppage in transitu exists, and order the carrier not to deliver them to the consignee. For example, a boot and shoe manufacturer in Rochester ships to a dealer in Chicago by the American Express Company, a case of shoes; the next morning he discovers by his daily commercial report that the dealer has failed. He delivers immediately to the agent of the express company in Rochester a notice like the following:

NOTICE OF STOPPAGE IN TRANSITU.

ROCHESTER, N. Y., July 1, 1892.

To the American Express Company:

Gentlemen,—I delivered to you yesterday one case of shoes consigned to Samuel C. Hasson, Chicago, Ill. Circumstances are such that I have the

*right of stoppage in transitu. Do not, therefore, deliver the case of shoes, but hold the same subject to my order.*

*Yours respectfully,*

*WILLIAM A. STERNBERG.*

He may send this by mail, but in that case he might have to prove that it was actually received, and would find it difficult to do so, consequently it is best to have it delivered personally to the express agent. If the company delivers the case of shoes after receiving this notice it is liable for whatever loss the shipper may sustain by such unauthorized delivery.

**Auction Sales** are sales in which the property is offered to the person who is willing to give the most for it. The two necessary elements are that the sale be public, that is, (1) open to anyone to become a bidder, and (2) competition between the bidders. The object of the auction sale being to secure the highest price for the goods, it is a necessary condition that the competition of the bidders be open and fair. The employment of persons by the seller, called by-bidders, to bid for him simply to run up the price of the goods, with the understanding that they are not to be bound by their bids, makes the sale voidable at the option of the buyer. Also a combination among bidders whereby a part are to abstain from bidding, allowing one to buy the property cheaply, is a fraud on the seller and makes the sale voidable as to him. An owner has a perfect right to bid on the property if it is done openly and fairly, unless the sale is made expressly without reserve.

**Fraudulent Sales.**—Property is sometimes disposed of, by persons who are badly involved in debt, in such a way as to keep it out of the hands of their creditors and save to themselves the use and profits of it. Sales of this kind are binding between the parties themselves, but under certain circumstances can be set aside by the creditors. If the consideration is not a valuable one, or if it is valuable, but the buyer knows that the sale is to defraud creditors, it can be set aside unless the debtor retains property enough to pay his debts. In some states it is provided by statute that all sales in which the possession of the property is retained by the seller, unless a written bill of sale is given and recorded, shall be considered fraudulent, whether they are actually so or not, and that subsequent purchasers without notice of the prior sale can hold the property.

#### QUESTIONS.

Define property; in what senses is the word used? Define personal property. What does it include? What is a sale of personal property? What is an executory sale? executed? give examples. What are the

necessary conditions of a sale of personal property? What is said of the parties? assent? price? subject matter? legality of subject matter? illegality? What connection has the statute of frauds with sales of personal property? give example of its application. Upon what does the transfer of title depend? Why is it important to know when the title has been transferred? In what senses is the term delivery used? Define actual delivery; constructive; give examples. What is the right of stoppage in transitu? Under what circumstances may it be exercised? What is necessary with regard to the indebtedness of the buyer? with regard to the goods being in transit? insolvency of the buyer? How is the right exercised? What are auction sales? What are the necessary elements? What kinds of sales are fraudulent? What is their effect? What statutory provisions are found in some states regarding fraudulent sales? Is there such a provision in this state?

## CHAPTER XX.

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### SALES OF PERSONAL PROPERTY.

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#### WARRANTY.

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**Warranty**, in a sale of personal property, is a contract on the part of the seller to be responsible for all damage if the property is not as represented and described. A warranty, being a contract, must of course be supported by a consideration. If it is made at the same time as the sale, or at some time prior to the sale, provided it operated as an inducement to make the purchase, the price of the goods will be a consideration for both the warranty and the contract to sell. If made after and as no part of the sale, it requires a new and independent consideration, but any slight though material consideration will be sufficient. With reference to the way in which they are made there are two principal sub-divisions of warranty, express and implied. With reference to the subject of the warranty there are also two kinds, warranty of title and warranty of quality. Either of these may be express or implied.

**Express Warranty** is a warranty expressly made by the seller. It may relate to any fact about the thing sold, the truth of which is unknown to the buyer; and it is not necessary that the seller use the word warrant. During negotiations for the sale of a horse, if the seller says he is sound, and relates that fact to assure you of its truth and induce you to purchase, and you rely on the statement, it is an express warranty, and if the horse is unsound in any particular the seller is liable for a breach of warranty. But a seller may express opinions of his property of a favorable nature and in commendation of it, which will not amount to warranty; as where an agent for a harvesting machine says that it is the best machine made, everybody understands this to be merely the expression of an opinion and it is not considered a warranty.

**Implied Warranty** is a warranty not expressed by the seller in so many words but implied from circumstances. An implied warranty on a particular point only arises when there is no express warranty on the

same point. If the seller expressly warrants his goods to possess certain qualities, no implied warranty can go any farther than this. An express warranty, however, relating to a quality, will not exclude an implied warranty of title, and vice versa.

**Warranty of Title** is a warranty on the part of the seller that he is the owner of and has the right to sell the property. As we have seen this may be either express or implied, but in sales of personal property a warranty of title is not generally expressed, unless a formal bill of sale is given to the buyer by the seller. In bills of sale there is usually a warranty on the part of the seller, stated in and made a part of the contract, that he owns and has the right to sell the property. Where the contract of sale is in writing, the warranty must also be written if it is made at the same time, since the terms of a written contract cannot be modified by an oral agreement made at the same time with it. If, however, the warranty is made subsequent to the contract, and for a new consideration, it may then be oral whether the contract of sale was written or not.

**Implied Warranty of Title.**—A sale of personal property implies an affirmation on the part of the seller that the property is his, and therefore he warrants the title, unless it is shown by facts and circumstances that he did not intend to assert absolute ownership but to transfer only such rights as he has. If the seller expressly asserts that he does not warrant the title, of course there can be no implied warranty of title, but in the absence of such express denial it is not very definitely settled just what circumstances will indicate an absence of such intention. Where a person in the capacity of sheriff or constable sells the property under an execution, there can be no implied warranty; also where the goods sold are in the possession of and claimed by other than the seller, there would seem to be no implied warranty.

**Warranty of Quality.**—This may be an undertaking on the part of the seller that the goods possess some particular quality or are fit for some particular purpose, in which case it is a special warranty; or it may be simply a statement that the goods are free from unsoundness or defects, in which case it is a general warranty; the warranty of quality may be either express or implied. It is an express warranty when there is a positive statement on the part of the seller that the goods are of a certain quality, made with the intention and effect of inducing the purchaser to buy.

**Caveat Emptor** is a commonly used latin phrase which expresses a legal maxim. It means "let the purchaser beware," and applies to a case in which the thing sold is before the buyer and he has an opportunity of examining it. Whenever the buyer has an equal opportunity

with the seller to examine the goods, he is bound to use diligence to discover defects or else require an express warranty of the seller. If he does not require an express warranty he takes the risk of quality upon himself, and must bear the loss, unless he can show that deceit was used to conceal defects or delude him.

**Implied Warranty of Quality** is a warranty which the law implies as to the merchantable quality of a thing sold when it is not submitted to the buyer, or if it naturally is not subject to inspection. Where a thing is made or supplied upon the order of the buyer, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or fit for the specific purpose of the buyer, if he communicates that purpose at the time he gives his order. If I step into a shoe store and ask for a pair of walking shoes, and a pair is selected by the dealer to whose judgment I trust, there is an implied warranty that they are reasonably fit for walking. In a sale of goods by description where the buyer has made no inspection, there is also an implied warranty that the goods when delivered will correspond to the description of them, in reliance upon which the sale was made. And whenever articles of food are sold to a consumer by one who deals in them, there is an implied warranty that they are wholesome and fit for consumption.

**Sales by Sample.**—When a sale is made of goods by means of the exhibition of a sample instead of the bulk of the goods, there is a necessary implication that the goods will be equal to the sample in quality; but the implied warranty only amounts to an assurance that the bulk corresponds to the sample in kind and quality. There is no implied warranty against latent defects in goods which are present in both sample and bulk. However, in order that an implied warranty may be claimed, that the bulk is equal to the sample, it must actually be a sale made by sample. Exhibiting the sample is not sufficient. It must be exhibited with the intention and understanding of the parties that the sample is a reliable representation of the goods, and that the buyer may determine the quality of the goods by an examination of the sample.

**Breach of Warranty.**—Where the goods sold are not as they have been warranted to be by the seller, there is said to be a breach of warranty. The warranty being a contract on the part of the seller, he is held responsible for its breach, and there are two ways in which the buyer may get satisfaction. If the sale is by sample and the warranty is broken by the failure of the goods to correspond to the sample, the buyer may refuse to accept them, provided the breach is discovered at the time or before the goods are delivered. If the breach cannot be discovered until some time after the goods are delivered, whether the

warranty is a sale by sample or otherwise, the only remedy would seem to be to sue the seller for damages for the breach, or set up the damages as a counter-claim against the seller in an action for the price.

### QUESTIONS.

Define warranty. What is said of the consideration? What kinds of warranty are there? Define express warranty; implied warranty. What is warranty of title? In what ways may it be made? What is implied warranty of title? When is such warranty implied? What is warranty of quality; special; general. What is the meaning of the term caveat emptor? when does it apply? When is there an implied warranty of quality? What constitutes a sale by sample? What implied warranty is there in such sales? What is a breach of warranty? What is the remedy?

## CHAPTER XXI.

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### SALES OF PERSONAL PROPERTY.

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#### CONDITIONAL SALES.

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**Conditional Sales** are those in which the title to property is vested, modified, or defeated, upon the happening of some event. If the seller is to give a title to the goods on the happening of the event and not before, it is called a condition precedent; if the effect of the happening of the event is to defeat the title, it is called a condition subsequent; for example, A buys a piano of B and agrees to pay for it in monthly installments of twenty-five dollars each; he gives his note for five hundred dollars, payable in monthly installments, and in that note agrees that the title to the piano is to remain with B, until the payment of the last installment, when it is to be transferred to A. This is a condition precedent, because the performance of the condition, that is the payment of the last installment, vests the title in the buyer. If a person takes his watch to a pawn-broker and sells it to him under an agreement that he can buy it back within a certain time, this is a condition subsequent, since the performance of the condition, that is the redemption of the watch, destroys the buyers title. The most common conditional sales, in addition to those already mentioned, are sales on trial, sales by sample, sales on condition that the goods arrive at a certain place, and chattel mortgages.

**Sales on Trial** are sales in which, by the terms of the bargain, the purchaser is to have possession of the thing sold for the purpose of trying it. It is sometimes called a sale on approval. The condition is that the property is to be found satisfactory. The buyer is bound to try the article within the time specified, and if no time is specified, then within a reasonable time. If the trial naturally involves an injury to or consumption of the article tried, the loss, if any, falls upon the seller, provided it is no greater than is necessary for the trial. The buyer has the whole time within which to make up his mind, and the sale does not become absolute until he has expressed his approval. If he does not approve the property he must return it or inform the

seller. If he does not return it within the agreed time, or within a reasonable time in case no time is specified, then the law will imply that he approves it, and the sale is absolute.

**Sales by Sample** have already been discussed under the head of warranty, and it is sufficient to say here that such sales are regarded both as sales under warranty and conditional sales; it is a condition precedent as well as a warranty that the goods correspond to the sample, and if they do not the buyer need not complete the sale by accepting the goods.

**Goods to Arrive.**—This is a sale of merchandise expected from abroad before the vessel conveying it has arrived. The condition is, that the merchandise shall arrive as expected; if the goods do not arrive, then there is no sale, since the condition on which the title is vested in the buyer has not been performed. There may be, however, an absolute sale of goods not yet arrived. If the seller delivers a bill of lading of the property to the buyer this will indicate an intention on the part of the parties to transfer the title, unless there is an express agreement to the contrary, and if the goods do not arrive it is the buyer's loss.

**Chattel Mortgages** are conditional sales in which the payment of a certain debt or the performance of a certain obligation defeats the buyer's title. As between the parties themselves a chattel mortgage may be made orally or in writing; but the statutes of most of the states provide that where possession of the property is retained by the mortgageor, a mortgage will be binding against subsequent purchasers without notice of its existence, and the creditors of the mortgageor, only when the mortgage is in writing and recorded in the office of the county recorder, county clerk, or register of deeds. Where nothing is said about it in the mortgage, the mortgagee is entitled to the possession of the property; but it is usual to insert a clause saying that except on certain conditions, the property is to remain in the possession of the mortgageor. In such cases the mortgagee is entitled to possession of the property only on the specified conditions. These conditions are various. The mortgage, of course, always provides that the mortgagee may take possession in case the mortgageor fails to pay the debt or perform the obligation which the mortgage is given to secure. He may be allowed to take possession whenever he deems the security unsafe; in fact his right to take possession of the property may be made to depend on the happening of any event.

**Form of Mortgage.**—As we have seen, a mortgage made orally will be binding between the parties themselves, but on account of the greater certainty thereby secured they are nearly always written. Some states

provide by statute that mortgages must be written. No particular formality in the writing is required but certain conditions must be complied with. In the first place the property must be described in such a way that it can be identified. The description ought to be such that a stranger with nothing but the mortgage to refer to can pick out the property covered by it. This degree of perfection is, of course, in most cases impossible, but as near an approach to it as possible should be aimed at. If the description is not sufficiently accurate to enable the goods to be identified by the aid of parol testimony, then the mortgage is invalid. The debt, also, for which the mortgage is given, should be so described as to distinguish it clearly from all other obligations. The mortgage should of course, contain the names of the parties, the conditions on which it will become an absolute conveyance, and be properly signed by the mortgageor, and delivered to and accepted by the mortgagee. The following is a short form of

#### CHATTEL MORTGAGE.

**Know all Men by these Presents:** *That I, JOSEPH STANTON, of the county of Ottawa and State of Kansas, party of the first part, in consideration of the sum of One Hundred Dollars to me in hand paid by CHARLES BUSH, of the county of Ottawa and State of Kansas, party of the second part, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents grant and convey unto the said party of the second part, all of the following described personal property, to wit: all my flock of fifty sheep.*

*To Have and to Hold the same unto the said party of the second part and his legal representatives forever.*

*The said party of the first part hereby covenants and agrees to and with the said party of the second part that he is possessed of the full right and title to the property hereby conveyed and that he will warrant and defend the same in the quiet and peaceful possession of the said party of the second part against the lawful claims of all persons whomsoever.*

**Provided Always,** *and these presents are upon the following conditions, to wit:*

*1. The said party of the first part has this day executed and delivered to said second party his certain promissory note of which the following is a copy:*

*\$100.00.*

*BENNINGTON, KANSAS, July 1, 1892.*

*One year after date I promise to pay to the order of Charles Bush, One hundred Dollars, with interest from date at 10 per cent. per annum.*

*JOSEPH STANTON.*

*Now if the said first party shall well and truly pay or cause to be paid, said sum of money in said note specified, with the interest thereon, when the same shall become due and payable, then this conveyance shall be void. But if the said first party shall fail to pay or cause to be paid, said sum of money in said note specified, with the interest thereon or any part thereof, when the same shall become due and payable, then and in either of these cases this conveyance shall become absolute, and said second party shall be entitled to the possession of the property hereby conveyed.*

*2. It is agreed by the parties hereto that the property hereby conveyed shall remain in the possession of the party of the first part until default is made in the payment of said note.*

*In Witness Whereof, I have hereunto set my hand this first day of July A. D. 1892.*

JOSEPH STANTON.

**Recording.**—The law regarding the recording of chattel mortgages depends upon the statutes of the different states, consequently reference must be had to them in order to determine exactly what is required. However, the statutes of nearly all the states require that where property is retained in the possession of the mortgageor, the mortgage must be recorded in order to be binding against subsequent purchasers and the creditors of the mortgageor. The object of recording is, of course, to give public notice of the existence of the mortgage to would-be purchasers of the property. If the mortgage is duly recorded, this is considered in law as being notice to everyone of its existence, whether they have actual notice of it or not. Since the sole object of recording is to give notice to the public, if it can be shown that subsequent purchasers of the property actually knew of its existence, it will be binding against them without being recorded.

**Foreclosure** of the mortgage is taking possession of the property because of the failure of the mortgageor to perform the obligation which the mortgage was given to secure. This also is regulated almost entirely by statute in the different states. Some states provide that after foreclosure of the mortgage the mortgageor shall have a certain time in which to redeem his property. Generally, however, the mortgageor has a right to redeem at any time prior to the sale of the property to satisfy the mortgage, but not afterwards. In most states all that is necessary to foreclose a chattel mortgage is for the mortgagee to take possession of the property. If the possession is not given voluntarily by the mortgageor the mortgagee can bring a suit, and possession will be given by an officer. After securing possession he is usually required to give public notice and sell the property at auction. In the

absence of statutory requirements, however, he may dispose of the property in any way he pleases, having, of course, proper regard for the interests of the mortgageor in securing a good price.

### QUESTIONS.

What are conditional sales ? Define condition precedent; subsequent; give examples. What are the principal kinds of conditional sales ? Define sales on trial. What are the duties of the buyer ? What are sales by sample ? What is the condition ? What is the condition in a sale of goods to arrive ? Who is responsible for loss of the goods ? Under what circumstances will the buyer be responsible. What are chattel mortgages ? When is the mortgagee entitled to possession of the property ? What is said of the form of the mortgage ? What conditions should be complied with ? What is the law regarding recording ? What is the object of recording ? What is the effect of failure ? What is foreclosure ? How are mortgages foreclosed ? What is the effect of foreclosure.

## CHAPTER XXII.

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### BAILMENTS OF PERSONAL PROPERTY.

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**Definition.**—A bailment is a delivery of personal property in trust for some special purpose, and upon a contract, expressed or implied, that the person to whom it is delivered will conform to the object or purpose for which the property was delivered; that is to say, it is a delivery of personal property by the bailor to the bailee, upon a contract that the bailee will do something with the property. A bailment differs from a sale in that in a bailment the title to the property is not transferred, whereas in a sale it is. Bailments are divided into two general classes: (1) those in which it is exclusively for the benefit of one party or a third person; and (2) those in which it is for the benefit of both parties, or of both or one of them and a third person. Bailments for the benefit of one of the parties may be for the benefit of either bailor or bailee.

**Degrees of Diligence.**—The important part of the law of bailments is in determining the circumstances in which the bailee is responsible for the loss of the goods; and the circumstances under which he is responsible depend on the kind of bailment, that is for whose benefit it is. Connected with bailments, the law recognizes three degrees of diligence, ordinary, extraordinary, and slight. Just what constitutes these different grades of diligence can be determined only in view of the circumstances of each particular case. Ordinary diligence is that degree of care which prudent men ordinarily exercise in respect to their own concerns. It is obvious, however, that this is a variable standard. Acts which in one country or in one age may be deemed negligent, may in others be deemed an exercise of ordinary diligence. So, also, what constitutes ordinary diligence may be affected by the nature, the bulk and the value of the articles. Slight diligence is less than the degree of care which ordinarily prudent men give to their own concerns, that is, less than ordinary diligence; and extraordinary diligence is more than ordinary diligence. Of course, there are all degrees of care, from the extraordinary diligence which results from the bestowal of undivided attention to the welfare of the article, to that absence of

care which amounts to wilful and criminal negligence, but these three degrees are all that the law specifies.

**Degrees of Negligence.**—Corresponding to these three degrees of diligence we have three degrees of negligence, ordinary, slight and gross. Ordinary negligence may be defined to be the want of ordinary diligence ; slight negligence to be the want of extraordinary diligence ; and gross negligence to be the want of slight diligence.

**Application to Bailments.**—Whether one or the other of these degrees of diligence is required of the bailee, and whether he is responsible for one or the other of these degrees of negligence, depend upon the object of the bailment. If the bailment is for the benefit of the bailor exclusively, then the bailee is bound to take only slight care of the property. Since it is purely a gratuitous work on the part of the bailee, he receiving no benefit from it, he is held to be responsible only where he is grossly negligent. When the bailment is exclusively for the benefit of the bailee, just the opposite is true. The bailee receiving the benefit and paying nothing for it, is bound to exercise extraordinary diligence, and will be responsible for slight negligence. Where the bailment is for the benefit of both, and both pay something for this benefit, the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary negligence. We shall find still other cases where the policy of the law makes the bailee responsible for very slight negligence, or even no negligence at all.

**Kinds of Bailment.**—Of bailments which are exclusively for the benefit of the bailor, we have two kinds, deposit, and commission. The only kind of bailment which is exclusively for the benefit of the bailee is in case of a loan for use. Of bailments for the benefit of both parties we have the pledge, and the bailment for hire. Bailments for hire we shall find to be divided into several classes.

**Deposit** is a simple delivery of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust. The deposit may be simply for safe keeping, the goods to be returned to the bailor at a certain time or on demand, or they may be deposited for the benefit of a third person to be delivered to him at a certain time or on demand. Since in this class of bailments the keeping is always without compensation, the bailee is bound to exercise only slight care over the goods, and is responsible only for gross negligence. We have already seen that what is slight care and gross negligence depend very much on the circumstances of each particular case. In this class of bailments the bailor, the one who deposits the goods, is frequently called the depositor, and the bailee, the one who receives the goods, the depositary.

**Finding Lost Property.**—When one finds money or other property that has been lost, he can do as he pleases about taking it into his possession. If he takes it into his care a bailment is thereby created, and the law imposes upon him the duties of a depositary. He must deliver the property to the owner on demand, and is not ordinarily entitled to a compensation for his services. If a reward has been offered for the return of the property, the finder acquires a right to the compensation named, and he may enforce payment by an action. Some states provide by statute for a compensation to persons who take up animals found astray on their premises.

**Returning Property.**—The depositary is obliged to return the deposit whenever it is properly demanded, and he must not only return the thing left with him, but he must also return all increase or profits that may have been added to it. A bailee without compensation, however, need not wait for a demand of the property unless he wants to. He may return it to the owner at any time, and terminate his responsibility. If the owner of the goods refuses to accept them and take them away within a reasonable time after they are offered, the bailee may remove them from his premises and will not be responsible for any resulting loss.

**Use of Property.**—The rule is that the bailee has no right to use the property left with him, but this must be accepted with the qualification that if the nature of the property is such that it will be benefitted by moderate use, it may be so used without any extraordinary risk. In such case it will be presumed that the depositor intended such use to be made of it. For example, the depositary may exercise a horse reasonably or milk a cow, as such use would be beneficial to the animal, but he must account to the bailor for any profits of such use, and may demand that his necessary expenses be returned to him.

**Commission.**—This is a bailment in which the bailee undertakes without compensation to do some act for the bailor with the thing bailed, as to deliver it to a certain person or at a certain place. This being also a bailment exclusively for the benefit of the bailor, the bailee is bound to exercise only slight diligence in performing the trust, and is responsible only for gross neglect. While this bailment is said to be without compensation, the bailee is entitled, as in deposit, to have returned to him his necessary expenses incurred in the discharge of his duty.

**Loan for Use.**—A bailment of this class is the loan of an article to be used by the borrower, without paying for the use, and returned to the lender, or disposed of according to his direction, at the termination of the bailment. As the loan is exclusively for the benefit of the borrower with-

out compensation to the lender, the borrower is bound to exercise extraordinary diligence in the care of the article, and is responsible for slight negligence. The borrower is exempted from liability for losses by inevitable accidents which cannot be foreseen and guarded against. However, in order to be exempted from responsibility even for inevitable accident, the borrower must use the article strictly in accordance with the agreement. If a person borrows a horse to ride on a particular journey, and uses it for another journey or another purpose, he will be responsible for any loss which may happen during such unauthorized use, even though it is caused by inevitable accident. The borrower is never liable for any loss or damage resulting simply and naturally from the proper use of the property; but if the borrower takes the property or permits it to be taken into dangerous places or used at improper times, he must bear any resulting loss.

**Return of Property.**—It is the duty of the borrower to return the thing borrowed at the time and place and in the manner contemplated by the contract. If no particular time is agreed upon, it must be within a reasonable time. Since this is a bailment entirely without benefit to the bailor, he can revoke it at his pleasure and thus demand a return of the property at any time. However, it is the duty of the bailor, if the loan is for a particular time, not to recall the property until the time has expired. If he unreasonably revokes the loan and occasions injury or loss to the borrower, he is responsible for damages. If no particular place is pointed out where the property is to be returned, it should be returned to the borrower at his usual place of residence, unless the thing properly belongs somewhere else.

**Pledge.**—A pledge may be defined to be a bailment of personal property as a security for the payment of a debt or the performance of some other obligation. A pledge differs from a mortgage in two particulars. Usually in a mortgage the property is retained in the possession of the mortgageor. In a pledge an essential element is that the property be in the possession of the pledgee. In a mortgage, the title passes conditionally to the mortgagee, whereas in a pledge the title remains in the pledgor. This is a kind of bailment which is for the benefit of both parties, since the pledgee procures new or additional security, and the pledgor receives additional credit. This being the case, the bailee is bound to exercise only ordinary care, and is liable for ordinary negligence.

**Use of Property.**—The bailee generally has only the right to hold the property, and can use it only at his peril. If the nature of the property, however, be such that use is necessary for its preservation, or is beneficial, he may use it; but it is his duty to use it in a proper and

legitimate manner. In all cases he must account to the pledgor for all increase or profits derived from such use. If the pledge is of such a nature that it will be injured by use, no right to use it can be presumed.

**Pledgee's Interest in the Pledge.**—The pledgee has a right to the possession of the thing pledged, during the time and for the objects for which it is pledged, and he may defend his interest against all persons, including even the pledgor himself. The pledgee cannot hold the property for any other debt than the one for which it was pledged. The pledgee's interest depends upon his continued possession, and hence a delivery of the property to the pledgor will deprive him of his security, unless this redelivery is for some special purpose, and with the understanding that the property is to be returned.

**Rights of the Pledgor.**—The rights of the pledgor depend much upon the contract under which the property is conveyed. If the possession of the property is given to the pledgee as an ordinary pawn, that is, if the property is sold on the condition that it may be redeemed within a certain time, when that time expires the pledgor has no right whatever to the property. The ownership becomes absolute in the pledgee. If, however, the delivery is not a transfer of ownership, but a mere pledge, the pledgor has never parted with the title, and he may redeem the property at any time before it is sold by the pledgee. If the pledgee in such cases does not choose to exercise his right to sell, he still retains the property as a pledge, and upon tender of the debt may at any time be compelled to restore it.

**Sale of Pledge.**—If the pledgee's right of possession were all he secured under the contract of bailment he would not be able to reimburse himself for the loss of the debt. The property is not forfeited by the pledgor's failure to pay the debt, unless, as we have seen, there is a special agreement to that effect, hence the pledgee must have some further right in order to complete his protection. This he has in the right of sale. Before he can sell the pledge he must make a proper demand for payment upon the pledgor after the debt becomes due. Payment having been refused upon such demand, he may upon giving reasonable notice to the pledgor to redeem it, and notifying him also of the time and place of sale, proceed to sell the things pledged, and apply the proceeds to the payment of the debt. The sale must be open and public, and the notice to the pledgor is indispensable, for without that the sale would be a wrongful conversion of the property, and would render the pledgee liable for damages. The pledgee is not allowed to retain the property and appropriate it to the payment of the debt. He must sell it and apply the proceeds, and he is not allowed to purchase the property himself even at a public sale.

**Bailment for Hire.**—This is a bailment of personal property where a compensation is given for its use, or for labor or services about it. This class of bailments is for the benefit of both parties, consequently the bailee must exercise ordinary diligence, and is responsible for ordinary negligence; and he is responsible not only for his own negligence, but also for the negligence of his servants. He is not responsible, of course, for loss arising from inevitable accident or superior force, unless it has occurred through his failure to use ordinary diligence in the care of the articles. Bailments for hire are of four classes: (1) hire of things, (2) hire of services, (3) hire of custody, and (4) hire of carriage.

**Hire of Things.**—This means the hire of a chattel for a particular use; the bailor is often called the letter and the bailee the hirer. The hirer is bound to use the property for the purpose for which it was hired. If he hires a span of horses and a carriage to drive on a particular journey, he must not take the team off the carriage and use it on a plow or reaping machine, nor must he drive it on any other journey than the one for which it was hired. Should he do this it not only renders him liable for damages for a breach of the contract, but it changes the degree of his liability, so that should the horses be injured or killed, even by inevitable accident, while engaged in this other work, he must answer for the loss. It is the hirer's duty to return the property to the owner when the purpose of the bailment is fulfilled, and he must return it in as good condition as when received, except for natural wear.

**Hire of Services.**—This is a delivery of goods to have some work done on or about them; as where a watch is delivered to a jeweler, or a pair of shoes to a shoemaker, to be repaired and returned. If the work be of an ordinary kind the bailee may employ others to do it for him, but if the contract implies the exercise of personal skill, like in painting a picture, he cannot, without permission, have the work done by other persons.

**Liability.**—The rule that in bailments for the benefit of both parties, the bailee is responsible for ordinary negligence, must be modified in its application to the hire of services, because the subject includes all kinds of services, and in some instances great skill is necessary. Wherever this is the case the degree of care and diligence necessary on the part of the bailee increases in proportion to the skill required. A blacksmith hired to forge a log-chain would need to exercise much less diligence than a watchmaker in repairing a watch. Where a workman engages to do some special work requiring a particular kind of skill, he must be presumed to possess it in an ordinary degree, and if he fails to exercise such skill, or in fact does not possess it, he will be responsible in damages. To determine whether the bailee is liable for damages on

account of a lack of skill it is only necessary to inquire: has he exercised the degree of skill and diligence ordinarily exercised in this branch of work? If he has then he is not liable for damages for injury; if he has not then he is liable.

**Lien.**—In order to secure to the bailee in this class of bailments compensation for his services rendered on the property bailed, he has what is known as the right of lien; that is, if the bailor refuses to pay him for his services he is entitled to retain possession of the property until he is paid. If the bailor absolutely refuses to pay him within a reasonable time the bailee may, on giving public notice, sell the property at auction and compensate himself out of the proceeds, returning the remainder, of course, after all costs are paid, to the bailor.

**Hire of Custody.**—This is a kind of bailment in which the property is placed in the hands of the bailee to be kept and cared for by him for a compensation. Examples are warehousemen, who make it a business to store goods for others; wharfingers, who keep a wharf for the purpose of receiving goods to it or shipping them from it; forwarders, who receive and forward goods; agisters, who receive cattle and horses for pasture; and innkeepers, who take charge of a guest's baggage. In all these different classes of bailments, except innkeepers, since they are for the benefit of both parties, ordinary diligence is required of the bailee, and he is responsible for ordinary negligence. As we shall see, innkeepers are subjected to a different degree of liability from other bailees of this class.

**Hire of Carriage.**—This is a bailment in which a person agrees to carry personal property from one place to another for a compensation. As we have already seen, the bailment in which a person agrees to transport goods without compensation, is called commission or mandate. The only difference between commission and the hire of carriage, is in the fact that the bailee receives a compensation in the latter and is obliged to use ordinary diligence, and is responsible for ordinary negligence. He is, of course, liable for the negligence of his servants as well as his own. Of carriers there are two kinds, private carriers and common carriers, and this rule of liability applies only to private carriers, persons who agree for a compensation to carry goods on some particular occasion or for a particular person, but do not make it a business to carry for the public. Common carriers, like innkeepers, are subjected to a different degree of liability from other bailees of their class.

#### QUESTIONS.

Define bailment; distinguish between bailment and sale; what general classes of bailment are there? What degrees of diligence does the

law recognize? define each. What degrees of negligence are recognized? define each. How are these degrees of diligence and negligence applied to bailments? What kinds of bailments are for the exclusive benefit of bailee? bailor? both? Define deposit; give the rule of liability. What rights has a finder of lost property? What is said of the return of property deposited? use of property? Define commission; give the rule of liability. Define loan for use; give rule of liability; what is said of the return of property? Define pledge; distinguish between mortgage and pledge; what is said of the use of property? What rights has the pledgee to the property pledged? Give effect of return of property? What rights has the pledgor? What is said of the sale of pledge? Define bailment for hire; what kinds are there? give the rule of liability. Define hire of things; give duties of the hirer. Define hire of services; give duties of bailee. Define hire of custody; hire of carriage; what kinds of carriage are there?

## CHAPTER XXIII.

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### INNKEEPERS.

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**Innkeepers.**—An innkeeper is a person who keeps an inn, tavern or hotel for the lodging and entertainment of travelers, for a compensation. The keeper is commonly known as a landlord, and the traveler whom he entertains, as a guest. Whether a house is an inn or not cannot be determined by the extent of its accommodations. It is an inn if the proprietor furnishes beds and meals for travelers as a business. The innkeeper must be distinguished from the keeper of a boarding house. The latter takes persons to board or lodge regularly while the innkeeper only keeps them for a short time. A place, however, may be an inn for some and a boarding house for others. Almost every hotel, in addition to accommodating travelers as an inn, has its regular boarders to whom it is a boarding house. Innkeepers are considered under the head of bailments, because a large part of the law concerning innkeepers relates to their liability for goods left in their care by the guests. In this way innkeepers become bailees and their guests bailors.

**Landlord's Duties.**—The keeper of an inn is bound to receive travelers. He offers the accommodations of his house to the public, and hence he must serve those who apply. He may demand payment in advance for their entertainment, but having room he must receive all travelers and their baggage at any hour of the day or night. He is not bound, however, to receive drunken or disorderly persons, nor such as are infected with contagious diseases or would otherwise endanger the safety of his guests, and if any of his guests become so while at his house he may require them to leave. If an innkeeper has room and refuses to receive a proper person, and give him entertainment, he will be responsible in damages.

**Guests.**—Persons received and entertained at a hotel are called guests. A guest is supposed to be a traveler, one who is transiently at the place, and desires food and lodging for a time. It matters not how long he remains at the inn so long as he retains his character as a traveler and temporary sojourner; he is still a guest and entitled to all the rights and privileges and subject to the liabilities of such.

**Innkeeper's Liability.**—It is the policy of the law to impose extra-

ordinary responsibility on certain classes of persons in whom an extraordinary confidence is necessarily reposed, and where there is an extraordinary temptation to fraud. There are two classes of persons on whom the law imposes this severe liability, innkeepers and common carriers. The innkeeper is an insurer of the property committed to his care against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property. He is liable for a loss occasioned by the negligence of his servants, by other guests, by robbery or burglary from outsiders, or by rioters and mobs. An innkeeper cannot relieve himself from this liability by expressly refusing to be responsible, since the law will not permit him to thus escape his own proper duty. An innkeeper, however, has the right to have his guests' property deposited in some safe place provided by him in order to guard himself against loss. If the landlord gives notice to the guest that property must be thus deposited, and the guest neglects to deposit it, the landlord's responsibility then ceases, and the guest takes the risk of loss upon himself.

**Landlord's Lien.**—The innkeeper has a lien upon the goods and baggage of his guest for his reasonable charges. The law gives him this lien because he is obliged to receive and entertain strangers, and this lien covers any goods brought to the hotel by the guest, even though they belong to some other person, provided the landlord does not know that fact. Whatever goods have been brought to the inn by the guest, except such as are worn on his person, are subject to the landlord's lien and can be held by him against all persons until his charges are paid.

**Boarding House Keepers.**—A boarding house differs from a hotel in being designed for permanent boarders and not open to the public. The keeper of a boarding house is bound to receive only such persons as he chooses and he does not assume the liability or become entitled to the rights of an innkeeper. He is not responsible for the loss of the goods of a boarder, and in the absence of statutory provisions has no lien on them for his charges. In some states, however, it is provided by statute that a boarding house keeper shall have a lien on the boarder's goods for his charges.

### QUESTIONS.

What is an innkeeper; landlord; guest? What are the duties of a landlord? What is the liability of an innkeeper? why different from other bailees of the same class? How may he be relieved from this liability? What security has a landlord that his charges will be paid? What is a boarding house keeper? how different from innkeeper?

## CHAPTER XXIV.

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### COMMON CARRIERS.

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**Common Carriers** are persons who undertake as a business to transport the goods of all who employ them, or passengers, from place to place for a compensation. The mode of transportation is not material. Express, railroad and steamboat companies are common carriers; so, also, are public truckmen and hackmen in cities, and the proprietors of stage lines. Two things are necessary to make one a common carrier; (1) a continued offer to the public to carry, and (2) the charge of a compensation for the risk and labor.

**Duties.**—A private carrier is under no obligations to carry for anyone unless he pleases to do so, but with a common carrier the rule is different. The common carrier enters into the business voluntarily, and he may retire from it at any time, but as long as he conducts the business it is his duty to receive and transport all such goods as come within his line of business. He cannot discriminate between persons but must receive the goods of all who offer them to the extent of his carrying capacity. It is a good excuse for the carrier's refusal to carry that his carriage is full, that the goods will endanger him, or are not such as he carries in the usual course of his business.

**Liability in General.**—As we have seen, there are some exceptions to the general rule that in a bailment for the benefit of both parties, the bailee is only bound to use ordinary diligence, and is liable only for ordinary negligence. The second of these exceptions is in the case of common carriers. The rule governing the liability of a common carrier rests on grounds of public policy. He becomes an insurer of the safety of the goods which he carries, and is responsible for them unless they are injured by the act of God or the public enemy. Even then the carrier is not excused from liability where his previous neglect brings the property into danger resulting in such loss. Where his delay exposes the property to destruction by flood, he cannot escape the responsibility. If the carrier takes a different route from the one agreed upon, he at once becomes liable for loss although resulting from causes which would otherwise have exonerated him.

**Limitation of Liability.**—The common carrier may limit his liability as an insurer of the goods so that he will not always be liable as he would be under the rules of law. In some states he may by contract, exempt himself from responsibility for loss arising from the negligence of his servants. In other states he is not permitted to exempt himself from responsibility for losses arising from his own or his servants' negligence. He is usually allowed to limit the amount of his liability, unless the value of the article is stated by the shipper, and it is taken by the carrier with full knowledge of its value. In any case, however, he cannot limit his liability by merely publishing a notice to that effect, unless the attention of the shipper is called to it. Such a limitation incorporated in a bill of lading or receipt given for the property becomes a part of the contract between the carrier and the owner, and will be binding on the owner.

**Carrier's Charges.**—It is not necessary that the amount to be paid for the carriage of the goods should be mentioned in the contract; it is usually agreed upon, however, and the carrier has a right to demand payment upon delivery of the goods. If the compensation which the carrier is to receive is not fixed by law,<sup>1</sup> the carrier may determine it himself, but having adopted and made known a usual rate, he is bound to receive and transport goods for this rate. If the price to which he is entitled is not paid, he is not bound to deliver the goods but may hold them for his charges, and if he retains them in his warehouse or place of business, he then holds them, not as a common carrier but as a warehouseman, and is liable, in case of loss or injury, only for ordinary negligence.

**Delivery by Carrier.**—This is necessary to the complete performance of the contract. The mode of delivery is regulated by circumstances, such as the kind of conveyance and the nature of the goods. A carrier by coach is usually bound to deliver the goods to the owner at his residence or place of business. In case of railroad and express companies, the custom is to deliver the goods at the depot or express office and send notice to the consignee to come and take them away. After such a notice has been given, and the consignee has had a reasonable time in which to remove the goods, the carrier ceases to be liable as a common carrier and is liable only as a warehouseman. In cities express companies usually keep a wagon and deliver goods received by them to the consignee, if his residence or place of business is known. This being the custom, of course it is a part of his duty. Where it is

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<sup>1</sup> The statutes of most of the states now provide that a common carrier shall not charge above a certain fixed rate for carrying goods or passengers.

the duty of the carrier to deliver the goods to the consignee, the carrier remains liable as a carrier until delivery is made at the residence or place of business of the consignee.

**Carriers of Passengers.**—A carrier of passengers is one who transports persons from place to place for a compensation. He makes an engagement with the public and becomes bound to convey all persons who pay or tender the usual fare. However, he is not bound to take persons who are disorderly or who will in any way injure his business.

**Rights and Duties.**—They have a right to prescribe reasonable rules and regulations in regard to the manner of receiving passengers. They may insist that the fare be paid in advance and that each passenger shall show his ticket on request. For a refusal to pay they may refuse to receive a passenger, and for a refusal to show his ticket they may put him off, but must not use unnecessary violence. If the parties have agreed that a railroad ticket shall be used only on a particular train or day, it can not be used otherwise.

**Baggage.**—It is now held that the payment of a passenger's fare includes the payment for the carriage of necessary baggage. There has been some difficulty in determining what should properly be included in the term "baggage," but it is now held to comprise anything which even an eccentric traveler may carry on a long journey for his personal convenience. Samples of goods, silverware and money in large quantities, cannot be considered baggage. The carrier is liable for baggage the same as a common carrier of goods, and he cannot limit his liability by a general notice, although he may make a contract to that effect. It is customary for carriers of passengers to have printed in their tickets a notice like "Baggage liability limited to \$100," and where this is the case more than this amount cannot be collected as damages for the loss of baggage. Where a railroad company sells through tickets over its own and other roads forming a continuous connection, and checks the baggage of its passengers through to their destination, it is bound to deliver it at that point and is liable for it there.

**Liability.**—A carrier of passengers is not under the same strict rule of liability as a carrier of goods. A carrier of goods is liable for any loss of the goods not occurring by the act of God or the public enemy, whether it occurs through his negligence or not. A carrier of passengers is only liable for injury to a passenger when it occurs through the negligence of the carrier or his servants, but he is liable for any negligence, however slight. The law exacts from him the highest degree of diligence and foresight. A railroad company is bound to exercise the greatest care in procuring and using roadworthy cars, in the management of its trains, and in the construction of its tracks and bridges, and

it is responsible for any injury unless it can show that such injury was not caused by its failure to use such diligence.

**Contributory Negligence.**—Where one sues a carrier to recover damages for personal injuries, it must appear that his own negligence did not contribute to such injuries. A carrier may prescribe reasonable rules for the conduct of passengers, and if a passenger is injured by reason of a failure to comply with these regulations, the carrier is not responsible. So if a third party is injured while trespassing on the company's grounds and by his own negligence, the company is not responsible.

**Negligence as to Third Parties.**—Railroad companies are liable for negligence the same as individuals. When their tracks cross public highways, they must take every precaution to avoid injury to persons or property. They must carry out the provisions of the statutes requiring the building of fences, cattle guards, etc.; the ringing of bells; and conformity to certain rates of speed. A failure to conform to all the requirements of the law in these matters will subject them to the payment of heavy damages if this failure results in injury to third parties. They are responsible for any injury to persons or property which is in any way the result of their negligence.

**Telegraph Companies** are in some respects common carriers and are properly considered under this head. They are carrying on a business which is in a certain sense public; they offer their services to the public and must serve those who offer the usual compensation for such service. As in the case of common carriers, a refusal on the part of a telegraph company to send a message, for which the usual compensation is tendered, will make it liable for damages.

**Rights and Duties.**—It is the duty of the company to send each message as soon as possible, in its regular order, and just as it is given it to send; it is not even allowable for it to correct an evident mistake in spelling or grammar. The company must deliver the message to the person addressed if it is possible to find him, although it may make an additional charge for any extra trouble it may be to in finding him, and may refuse to deliver the message until this is paid. Telegraph messages being confidential, the company must not divulge the contents of a message to any person other than the one to whom it is addressed.

**Liability.**—Ordinarily a telegraph company is liable to the sender of a message for any failure to send or deliver a message according to its agreement. Its contract is only with the sender, consequently it is not liable to the receiver for any negligence. Messages are usually written on blanks furnished by the company, on which are printed certain conditions in the form of a contract. These usually specify that the

company will be liable in damages for incorrect transmission only on certain conditions and, of course, these conditions must be complied with in order to hold it responsible.

#### QUESTIONS.

Define common carrier; give examples; what conditions are necessary? What are the duties of a common carrier? Give the rule of a common carrier's liability; how may it be limited? What security has he that his charges will be paid? When does the carrier's liability end? What is a carrier of passengers? What are his rights and duties? What does the term baggage include? What is the carrier's liability with regard to it? How may it be limited? Give the general liability of a carrier of passengers; how different from that of a common carrier. What is contributory negligence? What is its effect? What is said of the carrier's liability for injury to third parties? What is the business of a telegraph company? What is their relation to the public? What are their duties? rights? Under what circumstances are they liable?

## CHAPTER XXV.

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### SHIPPING.

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**Definitions and Explanations.**—A contract for shipping, or of affreightment, is an agreement for carrying goods by water. The conveyance may be any craft from the smallest lake or river boat to the largest ocean steamer. The parties to the contract are the owner of the vessel, and the shipper or merchant who owns the goods. There is sometimes a third party or middle-man who is simply the charterer of the vessel. In this case he has no goods to carry, but hires the vessel from the owner for the purpose of conducting a carrying trade. Usually, however, the shipper himself hires the vessel, and in that case he becomes also the charterer. The contract between the parties involves either the hire of the vessel or a part of it, when it is called the charter party, or the carriage of the goods, when it is called a bill of lading.

**The Charter Party.**—The owner of a vessel may charter it in two ways; he may hire it to one or more merchants, reserving possession of and navigating it himself according to the contract, or he may hire it absolutely, giving possession to the hirer. The contract by which the vessel is hired is called a charter party.

In the first case the charter party may be defined as a contract of affreightment, by which an entire ship or some part of it is let to the shipper for the conveyance of goods on a particular voyage in consideration of the payment of freight. In the case of inland waters navigable for only a portion of the year, the contract is often made not for a particular voyage but for the season. In this form of the charter party, is usually set forth: (1) the names of the parties and the name of the ship; (2) a description of the voyage to be performed; (3) the covenants on the part of the owner as to the good condition and seaworthiness of the vessel; (4) particular agreements as to the goods to be carried, reservations of portions of the vessel to the owner, etc.; (5) a statement of the excepted perils for which the owner does not intend to be responsible. These are usually the acts of God, or public enemies, detentions by the sovereign power of any state or government, fire, perils of the sea, and all other unavoidable dangers and accidents. (6) The covenants by the charterer to load and unload, within a given time, and providing for the amount and payment of freight and demur-

rage. The allowance to be made by the shipper to the vessel owner as damages for each day's detention of the vessel at any port beyond the time specified in the charter party, is called demurrage.

In the second case the charter party is a contract whereby the owner lets the vessel to the charterer for a given time, or particular voyage, and turns over to him the entire possession of it. It is in form quite like a lease, and during the time for which it is chartered the owner has no right to or control over it, but at the end of that time the charterer must return it to him in as good condition as when hired, ordinary wear and tear excepted. The essential difference between the two forms of charter party arises from the fact that in the former the owner retains possession and in the latter he surrenders it to the hirer.

**The Bill of Lading.**—Where a ship is let, wholly or in part, to one or more merchants it is called a chartered ship. Very often, however, the owner himself navigates the vessel, receiving and carrying freight indifferently for all who apply, the same as any other common carrier, in which case his vessel is known as a general ship. The contract between the owner and the shipper in this case pertains entirely to the conveyance of the goods, and is called a bill of lading. It is a written memorandum, signed by the captain or master of the vessel as agent for the owner or charterer, and delivered to the shipper acknowledging that the goods mentioned in it have been received upon the vessel for transportation. The shipper who thus sends or consigns the goods is known as the consignor, while the person to whom they are sent, is called the consignee.

The following is a proper form for a bill of lading, though without the enumeration of the excepted dangers, and the conditions regarding place and manner of delivery, which are now generally included:

#### BILL OF LADING.

*Shipped in good order and well conditioned, by E. D. Wilkins & Co., on board the sailing vessel called the ELECTRIC, whereof Richard Brown is master, now lying in the port of Tacoma, six thousand F. A. S. bunches of cedar shingles being marked and numbered as in CALLAO. the margin, and are to be delivered in the like order and condition at the port of Callao (the dangers of the sea only excepted) unto Frederick A. Sherwood, or to his assigns, he or they to pay freight for said shingles, with ten cents primage and average accustomed.*

*IN WITNESS WHEREOF the master of said vessel hath affirmed to three bills of lading each of this tenor and date, one of which being accomplished the others to stand void.*

*Dated at Tacoma, Wash., the 9th day of May, 1892.*

*RICHARD BROWN, Master.*

**Use of Bill of Lading.**—One of these the master of the vessel retains, while Wilkins & Co., the consignors, take the other two, and immediately forward one of them to Sherwood, the consignee. When the vessel arrives the bill of lading is evidence of the consignee's right to receive the property. Upon the delivery of the shingles to him, he surrenders the bill of lading to the master in whose hands it becomes an evidence of such delivery.

The bill of lading is a symbol of the property, and being properly transferred, it operates as a symbolic delivery of that which it represents. By its terms the property is to be delivered to the consignee or his assigns, and therefore by assigning the bill of lading to some other person he transfers his interest in the property to such assignee. Bills of lading are transferred by endorsement like negotiable paper, and very often pass through several hands in the course of the payment of business obligations before the consigned property arrives in port. For example, Sherwood receives the foregoing bill of lading from Wilkins & Co., and being indebted to W. E. Barton, he delivers this bill to him, after writing his name across the back of it. He may endorse it in blank as he would a bill of exchange or promissory note, or he may endorse it in full by writing above his signature "deliver to W. E. Barton or order," in which case Barton would have to endorse it himself if he wished to transfer it; and he must so endorse it when the property is delivered to him.

**Responsibility for Losses.**—The owner or charterer of the vessel, as we have seen, is a common carrier, but in his case there is an exception to the general rule of liability of common carriers. He is not liable for damages occurring through certain extraordinary perils of the sea, and this is what is meant by the clause "the dangers of the sea only excepted" in the bill of lading. These dangers include loss by storm, piracy, and fire at sea. The shipper must protect himself against such losses by insuring the property.

**Maritime Loans.**—Suppose the "Electric" to have been so damaged by storm that she cannot continue her voyage without putting into port for repairs. This she does at Acapulco, Mexico, but there is no one at that place who knows the master or owners of the vessel or anything about their responsibility. The master must have money immediately for repairs. How shall he borrow it? There are the ship, its accruing freight, and the cargo, but none of these belong to the master, and yet maritime law gives him the power to pledge this property belonging to others, as security for the money required for repairs. If the loan be made upon the vessel and accruing freight, the obligation given for it is termed a bottomry bond, but if upon the cargo, it is called a *respondentia* bond.

**Nature of the Loans.**—These securities amount to mortgages upon the property, and their payment depends upon the safe arrival of the vessel at her destination. The lender, therefore, takes a great risk, because if the vessel never reaches port he loses the entire amount of his loan, hence maritime loans always bear a very high rate of interest. These loans are usually made payable a few days after the arrival of the vessel at the end of her voyage. If not paid according to the terms of the bond, the lender may have his loan enforced by due process of law in a Court of Admiralty, and the property sold to satisfy his claim.

One peculiarity of bottomry is that where there are successive bonds given, they must be paid in exactly the opposite order from other liens, that is, the last one must be paid first, and so on in inverse order. The theory of this is that the last loan enables the ship to complete the voyage, otherwise she would have been lost, and the capitalists who had taken the responsibilities of the former loan or loans, would have received nothing, hence each is entitled in inverse order to what remains after paying the later loan or loans.

**General Average.**—Aside from the freight and the goods consigned, the shipper has to make the customary payment of a small sum to the master for his care and trouble, called *primage*. He must also pay charges for towage, etc., and *demurrage*, which has been already defined. He is, however, sometimes called upon to pay another charge growing out of the perils of navigation known as *general average*. This arises when it becomes necessary to sacrifice some part of the vessel or cargo to save the remainder. It is only equitable in such cases that the property saved should bear a proportionable amount of the loss, and this constitutes *general average*. The principle embraces every voluntary sacrifice to save property.

It covers the case of a delivery of a part of the cargo as a ransom to pirates or an enemy, where it is necessary to release the ship and balance of the cargo. It also includes the loss caused by cutting away masts and spars, and the throwing overboard of anchors, chains, etc., as well as parts of the cargo. Not every sacrifice of property, however, will constitute the ground for *general average*. It must not be the result of sudden impulse, but a deliberate act resulting from an exercise of the judgment. Goods that are heaviest and of the lowest value should be thrown overboard first. The sacrifice must be, (1) necessary, (2) voluntary, (3) successful, that is, it must result in saving the vessel and remainder of the cargo.

**Mode of Adjusting the Loss.**—The general rule is that all articles that pay freight must contribute, and the ship's owners contribute according to the value of the vessel at the end of her voyage, together

with her freight and earnings. This may be made more evident by an illustration. Suppose the storm by which we have assumed the "Electric" was damaged during her voyage to have been of such severity that the captain was obliged to throw overboard all the shingles shipped by Wilkins & Co. The vessel, which is owned by W. H. Fitch & Co., is worth, at the end of her voyage, \$38,000, and her freight earned is \$2,000, making, as a basis for the owners' contribution, \$40,000; Wilkins & Co.'s shingles are worth \$8,000, and the remainder of the cargo comprises the goods of L. L. Stone, worth \$20,000, and those of G. B. Miller, worth \$12,000. The entire value of the ship, freight, and cargo is then just \$80,000, and the amount of the loss, \$8,000, is ten per cent of the whole, which must be borne ratably by the owners and shippers. Fitch & Co. must, therefore, contribute \$4,000, Stone \$2,000, and Miller \$1,200, making \$7,200, while Wilkins & Co. must bear the remainder of the loss, namely: \$800, which is their just proportion.

**Salvage.**—This is the compensation allowed for saving property abandoned at sea. We have seen that the finder of a lost article on land, who takes and returns it to the owner is not usually entitled to any payment for his services, but the compensation for such services at sea is very large, varying according to the circumstances, and amounting sometimes to half or more of the entire value of the property saved. The right to it is not confined to those who find property that has been absolutely abandoned at sea, but rescuers who save vessels from the perils of the sea or from the enemy, are entitled to salvage. Many men along the coast, sometimes called salvors, engage in thus rescuing property as a business. If they fail they are entitled to nothing for their services, while if they succeed the law allows them liberal compensation out of the property saved. Where the amount of salvage is not regulated in any given case by statute, it is fixed by a court having admiralty jurisdiction. A person connected as seaman, officer, or pilot with the ship saved or the cargo of which is rescued, ordinarily has no right to salvage because he is hired and paid for his services in that connection, and can claim no pay for extra exertion. A passenger of the vessel may, however, become entitled to salvage, and where the ship has been so abandoned or captured by an enemy as to discharge an officer or seaman from his contract, he may then become entitled to salvage like any other salvor.

**Shipping and Railroad Transportation.**—Since the enormous developments of railroad facilities the term shipping has become to be used in a larger sense, and is now frequently applied to simple railway transportation. But it is also used in its original sense in connection

with carriage by railroad, because some of the great railroad corporations have steamship connections which enable them to receive goods at inland stations on the lines of their roads and ship them direct to a foreign port. In that case the railroad company enters into an agreement with the shipper to deliver his goods at their destination. This agreement is in form a combination of a railroad freight receipt and a bill of lading, and answers the purpose of both. Three or more of them are executed in each instance of the same tenor, and these are used and transferred by endorsement, in the same manner as the bill of lading.

**The Inter-state Commerce Law.**—On the 22d day of March, 1887, there went into effect a law enacted by the Congress of the United States known as the Inter-state Commerce Law, designed to regulate commerce between the states. Among its provisions are the following:

(1.) That it shall apply to all states and territories alike, and shall govern the traffic of all common carriers alike, whether on land or water, who do business in two or more states or territories.

(2.) That no discrimination shall be made among large or small, constant or occasional shippers, or among such as ship articles of greater or less value; that no charge shall be unjust or unreasonable; that proper facilities shall be given at termini for other shippers so as to avoid delay, and that *pro rata* charges shall govern in the long and short hauls alike; and all pooling of freights is by the Law declared unlawful.

(3.) In case of shipment from one state through a foreign country to another state, the rate must, as in all interstate freighting, be made public; and if this provision is not observed for such foreign passage, the goods so shipped can only re-enter the United States by the payment thereon of usual duties. Besides the requirement for the publication of rates, the law requires that any advance shall be published ten days before being demanded, while reductions in rates may be made without notice, but the fact of such reduction must be published as soon as made.

(4.) All schedules of rates and charges must be filed with the Commissioners, together with all contracts, from which no variation without notice can be made, unless subject to a penalty fixed by the Law, and enforceable in any United States court. In determining the justness of complaints against transportation companies the Commission has the right to subpoena witnesses and send for persons and papers, and any failure to comply with the demands of the commission is punishable as a contempt. After finding complaint to be just, notice is given the company charged with injustice, and unless reparation be made, an injunction may effectually restrain the continuance of such abuse.

(5.) When two thousand dollars or more is involved, either party may appeal to the United States Supreme Court.

(6.) The Commission may require all corporations of certain classes to employ a uniform system of bookkeeping so as to facilitate examinations. The Commission reports its business yearly to the Secretary of the Interior.

(7.) The object of the Law being to prevent abuses, provision is made for its being carried out. Appointments are made by the President and expenses are paid from the treasury of the United States.

### QUESTIONS.

Define shipping. Name the parties to the contract? In what way may the owner of a vessel hire it? What is a charter party? What is usually set forth in the charter party? What is demurrage? What is a chartered ship? general ship? bill of lading? What are the parties to a bill of lading called? What use is made of the bill of lading? How does the transfer of the bill of lading affect the goods shipped? How are bills of lading transferred? How may the bill be endorsed? What is the general rule of liability of the owner or charterer of a vessel? What is meant by "dangers of the sea"? How may the necessity for a maritime loan arise? Upon what property must the master secure his loan? What is a bottomry bond? A respondentia bond? What is the nature of these loans and upon what does their payment depend? What is said of interest upon maritime loans? When are they usually made payable? In case of nonpayment, how must the creditor proceed to satisfy his claim? What peculiarity exists in regard to payment where there are several bottomry bonds secured by the same vessel? Upon what theory is this based? What is primage? What is general average? What goods must be first sacrificed? What must characterize this sacrifice to compel contribution under general average? What articles must contribute in general average? How is the loss adjusted? What is salvage? How is the amount of salvage fixed where it is not regulated by statute? Are employees engaged in navigating the vessel entitled to salvage in saving the cargo or rescuing the ship? Under what circumstances may they be entitled to salvage? How has the use of the term shipping been recently enlarged? What is the Interstate Commerce Law? What scope has it? What is said of discriminations? Of pooling freights? With whom must schedules be filed and to whom must carrying companies report? In determining the justness of complaints what powers are given the commissioners? What may be done if carrier companies on notice do not repair the wrong?

## CHAPTER XXVI.

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### AGENCY.

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#### GENERAL PRINCIPLES.

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**Definition.**—An agent is any person who is employed by another to do any act for the employer's benefit or account. The one employing the agent is called the principal, and the business relationship existing between them is agency. A person dealing with the agent is termed a third party or third person. Any one may be a principal who is not under any of the disabilities that preclude a person from making a valid contract. The agent, since he does not need to bind himself, may be any person of sufficient understanding to transact the business committed to his charge. An infant, though unable in most cases to bind himself by contract, may nevertheless, if properly authorized, bind his principal as effectually as such principal could bind himself. Agency is one of the largest and most important of all business relations. Hence, it follows that the law of agency, or principal and agent as it is usually called, is one of the very important divisions of Commercial Law.

**How Appointed.**—An agent may be appointed by parol to do all acts and make all contracts, except such as are required by law to be executed under seal. Agents are perhaps more frequently appointed by letter or orally; but the formal way of constituting an agent is by power of attorney executed under seal. He must be appointed in the latter mode in order to be authorized to convey lands, or execute any other instrument under seal. The following is a usual form of

#### POWER OF ATTORNEY.

*Know all Men by these Presents, that I, John E. Martin, of the city of Albany, N. Y., have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Henry W. Barton, of the city of Chicago, Ill., my true and lawful attorney, for me and in my name, place, and stead,\* to grant, bargain and sell all my real estate situate in the said city of Chicago, or any part thereof, for such price, and on such*

*terms, as to him shall seem best, and for me, and in my name, to make, execute, acknowledge and deliver good and sufficient deeds and conveyances for the same, either with or without the covenants of warranty,\* hereby giving unto my said attorney full power to do everything whatsoever requisite and necessary to be done in the premises, as fully as I could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue hereof.*

*In Witness Whereof, I have hereunto set my hand and seal this 18th day of July in the year Eighteen Hundred and Ninety-Two.*

JOHN E. MARTIN. [SEAL.]

State of New York, }  
COUNTY OF ALBANY. } ss.

*On this 18th day of July, 1892, before me, the subscriber, personally appeared, John E. Martin, to me known to be the same person mentioned in and who executed the foregoing power of attorney, and he then and there in my presence acknowledged the same to be his free act and deed.*

SAMUEL J. PAINE,  
*Notary Public.*

Where the authority conferred is to execute a deed, mortgage, or any other instrument that is to be recorded, the power of attorney must be itself so executed as to entitle it to be recorded at the same place. This requires that it shall be acknowledged, substantially, as in the foregoing form, that is, that the person who has signed the paper shall go before a notary public or other proper officer, as a justice of the peace, a judge, commissioner of deeds, &c., and acknowledge that he executed the same; or in some of the states, it may be signed by a witness with an affidavit added showing that it was properly executed in the presence of the witness. It is best always to have a power of attorney acknowledged, or at least witnessed, but it is not necessary unless it is to be recorded.

It will be noticed that the part of the foregoing form included between the asterisks, or stars, sets forth the particular act or business to be done by the agent—selling and conveying real estate in this case,—and, therefore, by inserting in its place the proper words, the general form may be adapted to almost any kind of business. For example, if it were desired to authorize the agent to collect debts then the following might be thus inserted:

*To ask, demand, sue for, collect, receive and give acquittance for all sums of money, debts and demands, whatsoever, which are or shall be*

*owing me by any person or persons residing, or being at, the said city of Chicago.*

**Authority, how Proved.**—Where there is a power of attorney, letter, or other writing, by which the agent was appointed, his powers will be determined by it. In some cases his authority may be proved by circumstances or by the conduct of the principal. By allowing another to hold himself out to the world as his agent, the principal adopts his acts and will be held bound to the person who thereafter gives credit to the other in the capacity of his agent; for example, where one repeatedly sends his servant to a store to buy goods on credit, he will be responsible to the merchant for goods afterwards bought by the servant without his authority, if the want of authority is unknown to the merchant.

**Divisions.**—Agency is divided into two branches, general and special. Under the former the agent is called a general agent, and under the latter a special agent.

**A General Agent** is one who is authorized to transact all his principal's business in a particular line. The authority of a general agent is determined by the usual extent of his employment—by the authority generally held by general agents in that particular line of business—and also by his acts done with the knowledge of his principal. The acts of a general agent while acting within the general scope of his authority, will bind his principal whether in accordance with his private instructions or not. The public, or third persons, are not bound to inquire into the private instructions which he may have received from his principal.

Where an agent acts fraudulently, and some one must be the loser by his deceit or fraudulent conduct, it is just that he who employs and reposes confidence in him should be the loser rather than a stranger. A teller of a bank who certifies the checks of customers with the knowledge of the officers of the bank exercises a general authority. He is a general agent of the bank for that purpose, and if he fraudulently certifies the check of a customer without funds, the bank is liable to one who takes the check in good faith.

**A Special Agent** is one who is appointed for a special purpose, and is clothed with a limited authority. His acts do not bind his principal beyond the scope of such authority; for example, where an agent is authorized to sign a note payable in six months, and he signs one payable in sixty days, such note will be void. Hence a person who deals with a special agent should be sure that such agent acts within the precise limits of his authority, otherwise the principal will not be bound. If, however, the agent follows strictly the line of his authority as it is shown to the

public, his principal will be bound, notwithstanding he may have given his agent private instructions still further limiting his special powers. Within the scope of the business intrusted to him, whether that business be general or limited, the acts and representations of an agent will bind his principal.

**Implied Powers.**—An agent has certain incidental powers which are implied from the circumstances, that is, they are not stated in exact terms, but are understood. Where he is authorized to sell goods, he may do so on a reasonable credit if such goods are usually sold on credit. An authority to sell personal property, which is commonly or often sold with a warranty, enables the agent to bind his principal by a warranty. An authority to sell goods, that are intrusted to the possession of an agent, includes a power to receive payment; a general power to buy goods will authorize an agent without money to buy on credit. The fact that an agent is authorized by his principal to sell certain real estate, and that it is the custom of the locality to make such sales through brokers, authorizes the agent to employ a broker to negotiate the sale.

**Notice to Agent.**—The agent represents the principal in his business, and the principal is deemed to have notice of whatever is communicated to his agent. The principal is also supposed to have knowledge of the acts of his agent, done in the execution of his authority. For example, he is presumed to have notice of a contract made by a sub-agent appointed by a general agent, who had power to make such appointment. It is also a rule of law that notice to the principal is notice to the agent.

**Dissolution.**—The agency may be terminated or dissolved in the following ways, viz.: (1) by limitation, (2) by the direct act of the parties, (3) by change in the condition of the parties.

**By Limitation.**—Where there is a limit to the continuance of the relation between the parties, and that limit has been reached, the agency is said to have expired by limitation. In case the power or authority is given for a certain time, the expiration of this period will terminate the agency. Where the particular business for which the agency was constituted has been completed, as where the agent is authorized to sell a span of horses, or purchase a house and lot, such completion will terminate the agency.

**By Direct Act of the Parties.**—Either party may terminate the agency under certain conditions. The principal may revoke, that is, recall the authority given to the agent at pleasure, provided the authority remains unexecuted, but the moment it is executed it becomes the principal's contract and is beyond recall; for example, where an agent is authorized to sell property, the principal may revoke the authority up to

the time the sale is actually made, not after. The revocation of the authority of an agent reaches through him to all his sub-agents, and terminates their authority also. Revocation takes effect as against the agent and his sub-agents from the time they have notice of it, and as to third parties, from the time it is made known to them. The agent's authority may be absolutely revoked by notice to him from his principal; but one who has dealt with the agent has a right to assume, unless otherwise informed, that the agency continues, and the principal is bound by his agent's dealings, unless the person with whom he is dealing has had actual notice of the dissolution. No special form of revocation is necessary. Where the power was given under seal, it may be recalled by a writing not under seal, or orally; or it may even be implied from the acts of the principal. These rules in regard to the right of revocation by a principal do not apply where the agent has a personal interest in the property or business. The agent may terminate his employment by renouncing his authority. This may be done at any time, and the agent is bound to give notice of it to his principal. Unless, however, the agreement provides for such renunciation at pleasure, the agent will make himself liable to his principal for any resulting damages.

**By Change in Condition of Parties.**—Any change in the condition of the principal which renders him incompetent to contract, or in the condition of the agent which renders him incompetent to do the business for which he was engaged, will dissolve the agency. The principal changes which will have this effect are as follows: (1) bankruptcy; (2) incompetency; (3) marriage; (4) death.

**Bankruptcy.**—In general, the bankruptcy of either party terminates the agency. If the principal becomes a bankrupt, his property passes out of his hands, and hence he would be incapable of carrying out any agreement in regard to it. But, as in the case of revocation, the rule that bankruptcy of the principal terminates the agency does not apply where the agent has an interest in the business. The bankruptcy of the agent terminates his authority at once, except to do some formal act not involving the transfer of any interest; as, for example, to execute a deed of property already sold. By bankruptcy is here meant not mere inability to pay one's debts but a technical case of bankruptcy where the party has been declared a bankrupt by a court of bankruptcy.

**Incompetency.**—Where the principal becomes incompetent to make a valid contract, as by reason of insanity, it terminates the agency; but generally this can be determined only by legal proceedings to establish the fact of such insanity. The incompetency of the agent will also work the dissolution of the agency. This may result from insanity, or from any other cause that renders him incapable of transacting his principal's business.

**Marriage.**—Under the common law, where a single woman was principal, her marriage dissolved the agency because it suspended her power to contract. In like manner, under the common law, the marriage of the agent, who was a single woman when appointed, had the same effect. She might be reappointed, however, under the changed conditions, since a married woman could be an agent, though not being capable of contracting, she could not be the principal. These last rules have been so much changed by the statutes of the different states, modifying or removing the disabilities of married women, that reference must be had, in any given case, to the laws of the state in which it arises.

**Death.**—The death of either party terminates the agency. The authority of an agent is a personal trust and will not pass by operation of law to his heirs or personal representatives, but expires with him. The death of the principal terminates the agency, because, as in the case of his bankruptcy his property passes immediately into the hands of others, and because further, as an agent's acts must be the acts of his principal his power is gone, since a dead man can do no act. On this theory such termination of the agency has been settled by the common law as dating from the time of the principal's death, and not from the date when notice of it is given to the agent or third parties.

### QUESTIONS.

Define agent; principal. What is agency? Who are third persons, or parties? Who may be a principal? Who an agent? How may an agent be appointed? How are agents usually appointed, and what is the formal way of appointing them? When must an agent be appointed in the latter way? What is an acknowledgment, and when is it necessary in the case of a power of attorney? How is an agent's authority proved where it is written? when oral? When may the principal's conduct establish the agency? How is agency divided? Define general agent. What is his authority? How affected by private instructions, and why? Define special agent. How far does his acts bind his principal? When do the agent's representations bind his principal? What are implied powers? What is a person dealing with an agent bound to know? What is the rule as to notice to the agent? With what knowledge is the principal chargeable? What is the rule as to notice to the principal? In what ways may an agency be terminated? What is meant by saying that the agency has expired by limitation? What by express limitation? What by implied limitation? What is the second way? How and when may the principal terminate the agency? When does it take effect as to the agent? As to third parties? What is the rule in regard to form of revocation? How

applied? What exception is there to the principal's right of revocation? How and when may the agent terminate the agency? What liability may he incur? What is the third way? Why does bankruptcy of the principal terminate the contract? What exception is there to the general rule? What may the agent do after he becomes a bankrupt? What is the second changed condition that will terminate the agency? What incompetency of the agent will terminate the agency? What is the third changed condition terminating an agency? What is the fourth changed condition? From what time does such termination date?

## CHAPTER XXVII.

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### AGENCY.

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#### LIABILITY OF PARTIES.

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**Liability of Principal.**—Under the contract of agency the principal becomes liable in two ways; (1) he is liable to the third parties for the acts of the agent, and (2) he is liable to the agent for the fulfillment of his agreement. The liability of the principal to third parties arises in three ways, viz.: (1) under the contract; (2) for the wrongful act of the agent, and (3) by the subsequent ratification of an unauthorized act.

**Under the Contract.**—Where the principal authorizes an agent to make a purchase in his name, and he does so, the contract is that of the principal, and he only is liable for the purchase price. In general, the principal must be responsible for all his agent's acts done within the scope of his authority, and this is the rule, even though the principal be unknown at the time to the third person with whom the agent has dealings. Although the principal may have given his agent private instructions limiting his power to less than his apparent authority, it will not relieve the principal from liability when the agent violates such instructions, provided the person with whom he is dealing has no knowledge of such special instructions.

**For Wrongful Act of Agent.**—When an agent acts wrongfully and negligently in the business intrusted to him, the principal is liable. Where a servant sent by his employer to remove snow and ice from a roof, does it in such a careless manner as to injure a person in the street below, the principal is liable for the damages; and this is so even though the agent employed a stranger to do the work for him. The principal is also responsible for the unskillfulness of his agent. Where a city, by its agents, unskillfully constructs a faulty and insufficient culvert, it thereby becomes liable for resulting damages. If the agent commits a fraud in the regular transaction of his principal's business, the principal is liable for it, though it was done without his authority. But where an agent commits a willful act of trespass not within the scope of his authority, he alone is liable—he does not bind his prin-

principal. If a servant willfully drives his master's carriage in such a manner as to injure persons or property, he alone is liable, provided it was done without the consent of the principal. The willfulness of the act relieves the principal.

**Ratification.**—Though the act of an agent be wholly unauthorized, yet it may be ratified by the principal so as to bind him from the beginning. If an agent reports what he has done with some appearance of authority, the silence of his principal may be considered a ratification when the principal is reasonably bound to speak. When the principal, with knowledge of what has been done in his name without authority, consents to be bound by it, the act becomes binding the same as if the agent had been authorized in the beginning. But the ratification of the unauthorized act, in order to bind the principal, must be made with a full knowledge of all the material facts. Ratification under a misrepresentation or misunderstanding of the actual facts of the case will not bind the principal. Ratification of an agent's acts will be presumed unless the principal, when he has knowledge of such acts, expresses his dissent within a reasonable time. The principal may ratify his agent's unauthorized acts by express words, but it more commonly results from his accepting the act by receiving the benefit or proceeds of it. He cannot, however, claim the benefit of the agency in part only and reject it as to the residue. By adopting a part of the act he becomes bound for the whole.

**Liability to Agent.**—The principal is liable in general to his agent for the fulfillment of his agreement, the most important part of which usually is to pay him the compensation for his services to which he is entitled under the contract between them. Where the agent in the course of his employment has been obliged to advance money for the payment of proper expenses or for other legitimate purposes, the principal is liable for the repayment to him of such advances, and usually with interest upon the same. The principal is further liable to the agent for any damages he may have suffered, without fault on his part, in following the principal's instructions.

**Liability of Agent.**—The agent's liabilities arise in two ways; (1) he is liable to his principal for a failure to properly perform his duties; and, (2) under certain circumstances, he is liable to third parties. The rule of law is that where an agent acts with authority in a lawful manner, he is not personally liable to third persons for his acts although, as we shall see, there are exceptions to this rule. But where the agent acts fraudulently or unlawfully, he is responsible to third parties, and he sometimes becomes liable to them under his contract.

**Where he Acts Fraudulently or Unlawfully.**—It is a principle of

law that no one can confer upon another authority to commit a fraud or to do an unlawful act. Hence no agent can avoid liability for such wrongful act by showing that he did it for his principal and by his authority; and therefore the agent is himself responsible. He is not, however, liable as an agent, but as a wrong doer.

**Under the Contract.**—An agent is liable to third parties when the form of his agreement with them or the general course of dealing, imposes such liability upon him. This occurs in the following cases, viz.: (1) where the agent specially agrees to be responsible; (2) where the principal is unknown; (3) where the agent exceeds his authority; (4) where there is no responsible principal; and (5) where certain classes of agents are generally held liable.

**Agreement.**—As a matter of course, when the agent, being a person capable of contracting, agrees to be personally responsible, he is liable as he would be under any other lawful contract, and must see that his principal carries out the agreement made on his behalf, or fulfill it himself.

**Unknown Principal.**—Where the principal is not known, the agent is liable because the credit is given to him, or the transaction, whatever it may be, is entered into by the other party on the faith of his responsibility. It is immaterial whether he professes to be acting for himself, or claims to represent some principal whom he does not disclose; the same rule of responsibility applies and the same reason for its application exists in either case. When, however, the principal is discovered, he is also liable to the third party, but this in no wise relieves the agent from his liability.

**Exceeding Authority.**—An agent is presumed to know the extent of his authority better than any third party, and hence if he exceeds that authority, while he may not bind his principal, he does become liable himself, even though he innocently supposed his authority broad enough to cover the transaction.

**No Responsible Principal.**—Ordinarily where a person assumes to contract as an agent, without a responsible principal against whom creditors may proceed, he is himself liable. For example, at a public meeting to arrange for the celebration of the completion of the Erie Canal, three men were appointed a committee of arrangements, who afterwards employed a man to build a boat to be carried in the procession, and the members of such committee were held liable for the cost of the boat.

**Custom.**—The master of a ship is the agent of the owner and is known as such, yet he is liable personally upon all contracts for supplies and for repairs to the ship. Agents and factors who represent prin-

cipals residing in foreign countries are held personally liable on all contracts made by them, whether the fact of their agency is mentioned in the contract or not. The presumption in such cases is, that the principal being so far away the credit is given to the agent.

**Liabilities to Principal.**—The agent is bound, in general, to follow his instructions so long as they are within the limits of legality, but he need not do any unlawful act at his principal's bidding. He owes it as a duty to his principal to exercise such diligence as the nature of the business requires; to keep him fully informed in regard to all matters relating to or connected with the business; to give his personal attention to it; to keep and render proper accounts of his transactions; and to keep the goods or property of his principal with the same care and attention that a prudent man would bestow upon his own. A failure on the part of the agent to properly perform all these duties, will render him liable to his principal for whatever damages may result from such failure. In the absence of instructions he must follow in his transactions such established customs and usages of trade as may exist in relation to the particular business in which he is engaged. It is the duty of an agent to act for the interests of his principal with all his skill and ability, and he cannot do this where he owes a divided duty; hence in any transaction an agent cannot act for both parties, unless he is known by both parties to be so acting. If he acts for both parties in making a contract without their knowledge, neither of them will be bound by it. He must not have any interests adverse to his principal, and hence he cannot act as both buyer and seller. If an agent in any way by violating his agency obligations makes any gain his principal is entitled to it, but if he suffers any loss he must himself bear it. An agent is also liable to his principal for any loss or damage resulting from his wrongful acts.

#### QUESTIONS.

In how many ways does the principal's liability arise? What are they? What is the rule as to the responsibility of the principal when he is unknown? What is the effect where the agent violates his private instructions? What is said of the principal's liability for his agent's wrongful acts? for an agent's negligence? for unskillfulness? for fraud? for willful trespass? Give an illustration of each? How may the principal become bound by the unauthorized act of his agent? What is ratification? What presumption exists in regard to the ratification of an agent's acts? What is the rule in reference to partial ratification? In what way does this liability arise? What is said of the principal's liability to the agent? What is the rule of law in reference to the lia-

bility of agents to third parties? What are the exceptions? In what character is the agent responsible where he acts wrongfully? State the second exception fully? Under what conditions may the liability arise? What is the second condition? On what ground is the agent liable when the principal is unknown? What effect has the discovery of the principal? Give the third condition? Upon what presumption is it based? What is the fourth condition? Give an illustration? What is the fifth condition? Give an illustration? What is said of the agent's liability to the principal?

## CHAPTER XXVIII.

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### PARTNERSHIP.

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#### FORMATION AND DIVISIONS.

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**Definition.**—Partnership is the relationship resulting from an agreement between two or more persons, to place their money, effects, labor and skill, or some or all of them, in some enterprise or business, and to divide the profits and bear the losses in certain proportions. Such a joint undertaking constitutes a partnership, or what is the same thing, a copartnership. The partners are sometimes referred to collectively as a house, but more commonly as a firm. Partnerships may be general, or limited.

**How Formed.**—Partnerships are formed, as the above definition indicates, by agreement or contract of the parties; but this agreement is often partly, and sometimes wholly, implied. Hence partnerships may be said to be formed by one of the following means: (1) By a written contract, under seal or not under seal; (2) by an oral agreement; (3) by implication.

**By Written Contract.**—In the formation of a copartnership, especially if the amount involved is large, the business complicated, or the duration of the partnership is to be long, the contract should be in writing; and great care should be taken, as indeed in the case of every other contract, that the writing expresses all of the agreement. The written agreement is generally called Articles of Copartnership. It is sometimes executed under seal.

The following is a form for a copartnership agreement between merchants:

#### ARTICLES OF AGREEMENT.

*Articles of Agreement, made the third day of March, one thousand eight hundred and ninety-two, between Edgar M. Bond, of Troy, N. Y., of the first part, and Louis N. Chapin, of Albany, N. Y., of the second part, witnesseth as follows:*

I. *The parties above named have agreed to become copartners in business, and by these presents do agree to be copartners together under and by the firm name of Bond & Chapin, in the business of merchants and dealers in dry goods, at the said city of Albany, the partnership to commence on the first day of April, 1892, and to continue five years.*

II. *To that end and purpose the said party of the first part has contributed the sum of twenty thousand dollars in cash, and the said party of the second part has contributed the lease of the store No. 195 Main Street, in the said city of Albany, to be occupied by them, and also his stock of goods and the good-will of the business heretofore carried on by him, which are together estimated and valued by the parties at the like sum of twenty thousand dollars, the capital stock so formed to be used and employed in common between them, for the support and management of the said business to their mutual benefit and advantage.*

III. *At all times during the continuance of their copartnership they and each of them will give their attendance, and do their and each of their best endeavors, and to the utmost of their skill and power exert themselves for their joint interest, profit, benefit and advantage, and truly employ, buy, sell and merchandise with their joint stock and the increase thereof in the business aforesaid, and also that they shall and will at all times during the said copartnership bear, pay and discharge equally between them all rents and expenses that may be required for the management and support of said business; and that all gains, profits and increase that shall come, grow or arise from or by means of their said business shall be equally divided, and all losses by ill commodities, bad debts or otherwise, shall be borne and paid between them equally.*

IV. *And it is agreed by and between the said parties that there shall be had and kept at all times during the continuance of their copartnership, perfect, just and true books of account, wherein each of the said partners shall enter and set down all money by him received, paid, laid out and expended in and about the said business; all goods, wares, commodities and merchandise by him bought or sold by reason or on account of the said business; and all other matters and things whatsoever to the said business and the management thereof in anywise belonging; which said books shall be used in common between the said copartners, so that either of them may have access thereto, without any interruption or hindrance of the other. And also each copartner, once in each year, or oftener if necessary, shall make, yield and render, to the other, a true, just and perfect inventory and account of all profits and increase by him made, and of all losses by him sustained; and also all payments, receipts, disbursements, and all other things by him made, received, disbursed,*

acted, done or suffered in said copartnership and business ; and the said accounts having been made, each partner shall clear, adjust, pay and deliver, to the other, at the time, his just share of the profits, and pay and bear his just share of the expenses and losses so made as aforesaid.

V. And the said parties hereby mutually covenant and agree, to and with each other, that during the continuance of the said copartnership neither of them shall indorse any note, or otherwise become surety for any person or persons whomsoever, without the consent of the other of said copartners. And at the determination of their copartnership the said copartners, each to the other, shall make a just and final account of all things relating to their said business, and in all things truly adjust the same ; and all and every, the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts or otherwise, shall be divided equally between them.

\* \* \* \* \*

*In Witness Whereof*, the parties hereto have hereunto set their hands and seals, in duplicate, the day and year first above written.

EDGAR M. BOND [SEAL.]  
LOUIS N. CHAPIN [SEAL.]

*Signed, sealed and delivered in the presence of*  
C. IRVING JONES, Albany, N. Y.

**Additional Provisions.**—Although these articles of copartnership are supposed to constitute the agreement between two persons about to begin a mercantile business, yet with slight changes, that would readily suggest themselves, this form could be adapted to very many other kinds of business, and varied to conform to the number of partners. There are, however, a number of other general provisions, which may be inserted in place of the asterisks, provided the agreement of the parties includes the points thus covered. One of these fixes the limit of the amount to be drawn out by a partner and may be as follows:

*Each of the parties may draw from the cash of the joint stock the sum of six hundred dollars quarterly, to his own use, the same to be charged in account, and neither of them shall take any further sum for his own separate use, without the consent of the other in writing ; and any such further sum taken with such consent shall draw interest at the rate of six per cent. per annum, and shall be payable, together with the interest due, within twenty days after notice in writing given by the other party requiring such payment.*

Another provides what particular part of the firm business shall be done or managed by the different partners. For the foregoing articles of copartnership such a provision might read as follows, and could be modified to suit other conditions or different kinds of business as occasion required:

*The said party of the first part shall devote his time to the management of the books and finances of said firm, and the purchasing and importing of goods necessary to the said business; and the said party of the second part shall devote and give all his time and attention to the business of the said firm as a salesman, and generally in the care and superintendence of the store; and no debt shall be contracted for more than \$5,000, and no credit given for more than \$500 by either of said parties without the consent of the other.*

Still another provision relates to the dissolution of the copartnership and may be as follows:

*In case of the violation of any of the foregoing covenants and obligations by either of the parties hereto, the other party may at his option dissolve this copartnership by giving the other party written notice of his election so to do, within ten days after being informed of such violation. After the expiration of the first two years of said copartnership either party may dissolve the partnership, at his election, by giving three months' previous notice in writing to the other partner, of his intention so to do.*

Other provisions, sometimes used, stipulate for a reference of disputes to arbitration; for an offer to be made upon dissolution by any partner to buy or sell at a price he may name, which the other partner or partners must accept within a given time; for a sale at auction, of the assets, in case the parties cannot agree upon a division at the expiration of the copartnership; and also that after dissolution the retiring partner shall not carry on the same trade or business within a certain number of miles of the location of the firm business.

**By Oral Agreement.**—But there is no necessity for a written contract in order to constitute a partnership. Very many partnerships are formed by oral agreement. The proposed partners simply meet, talk over the project and come to an understanding which constitutes the partnership agreement; but very often the terms of this agreement are vague and only cover part of the conditions. In such cases the law prescribes rules by which their respective rights are to be determined in all matters not included in the agreement. As to the parties themselves, the law will recognize them as partners.

**By Implication.**—The parties may so conduct themselves that the law will presume the existence of a copartnership between them, whether they intended it or not, and hold them responsible as partners, to third parties. There is, however, a distinction between (1) an actual partnership by implication, and (2) a partnership by implication as to third parties.

(1) Occasionally persons engage in business together without any agreement, under such circumstances that an actual partnership is formed; for example, a merchant in Boston requests a merchant in New Orleans to purchase and send him a certain number of bales of cotton for sale on their joint account, and the request being acted upon, the two become partners in the adventure. The cotton being bought and disposed of each becomes liable as a partner for the full amount of any obligation that may arise out of the transaction. But since there can be no actual partnership that does not arise out of a contract between the parties, the law in such cases implies the agreement.

(2) Should a person who is not a partner, or even interested in a particular partnership, so conduct himself as to make others believe him to be a partner, and thus induce them to give credit to the firm, on the strength of his responsibility, he would become liable as a partner though not such in fact. In other words the law implies a partnership between him and the other members of the firm for the benefit of third parties.

**Limited Partnership** is a species of partnership which can only be formed in pursuance of a statute authorizing such, and is possible only in those states where special statutes have been enacted allowing their formation. The chief feature which distinguishes a limited partnership from a general partnership, is the limited liability of one or more of the partners. In a general partnership, each partner is liable for all of the debts of the firm, even if these debts exceed his interest in the business. In a limited partnership, by provision of the statutes under which they are formed, the liability of one or more of the partners is limited to the amount of the capital actually contributed by them. The names of the limited partners do not generally appear in the firm name. That is composed of those partners who are held out to the world as the real, ostensible partners, and who are the active business partners, with unlimited liability.

**Formation.**—The provisions of the statute relating to the formation of limited partnerships must be strictly followed, or the firm will be treated as an ordinary partnership. The statutes of those states which have provided for such partnerships have a general similarity. The

persons proposing to form such a partnership make and sign a certificate or agreement which is properly executed and filed with the public records of the county in which the business is to be transacted. This certificate states the name of the firm and nature of its business, together with the names of the partners, and the amount of capital contributed by each. In some states it is necessary to publish in a newspaper the terms of the partnership.

**The Firm Name.**—The name of the firm is usually fixed by the articles of copartnership, but this is not necessarily the case. The firm may bind themselves by any name they may adopt, and the name that they actually use in their business transactions will be considered their firm name. They may carry on the firm business in the individual name of one of the partners, or they may adopt a name that does not include the name of any of the partners. For example, the firm name in the form given above may be made “Edgar M. Bond,” or “Bond & Co.,” or “The Hudson Mercantile Co.,” or any other name the parties might agree upon. There are some restrictions imposed by state statutes by which it is made unlawful, among other things, to use the name of one who is not interested in the firm, or to use “& Co.” where it represents no one.

#### QUESTIONS.

Define partnership. How are partners referred to collectively? How are partnerships formed? What is the written agreement usually called? What additional provision is sometimes inserted? Name a second. And a third. What other provisions may be inserted? How otherwise are partnerships formed? How may a partnership arise by implication? Give an illustration. What is a limited partnership? How formed? How is the firm name fixed? What may it be?

## CHAPTER XXIX.

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### PARTNERSHIP.

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#### PARTNERS.

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**Kinds.**—As we have seen, a partnership results from or grows out of a contract, and therefore only such persons as are competent to contract can become partners. For the same reason no one can become a partner against the wish of the others, because another of the necessary conditions of the contract would be wanting, viz., assent. Partners are of four classes and are distinguished as follows: (1) Real or ostensible, (2) dormant or concealed, (3) limited, and (4) nominal.

**The Real or Ostensible Partner** is one who appears to the world to be and actually is a partner, and enjoys the benefits and assumes the risks of the position.

**Dormant or Concealed Partner.**—It sometimes happens that a person invests money or capital jointly with one or more other persons in some business adventure, and at the same time keeps the fact of his connection with the enterprise a secret. This makes him a dormant or concealed partner. Of course his name does not appear in the firm name or in any other manner in their business. This is done to avoid the risk and responsibility of an ostensible partner, and so long as the concealment is perfect he escapes liability to the firm creditors. He is, however, in fact a real partner, and the moment a creditor of the firm ascertains his connection with it, he may sue and recover from him the same as from any other partner; and the fact that the creditor did not trust the firm on the strength of his relationship with it is not material, for his liability to third parties is based upon the contract with his copartners.

**The Limited Partner** exists only in states where the statutes provide for the formation of limited partnerships. Such a partner, by complying with the requirements of the statute, may contribute any certain amount agreed upon to the partnership capital, and his risk extends only to the loss of the sum so invested. His liability is thus

limited, and none of the debts of the partnership can be collected from him.

**Nominal Partner.**—As we have seen, a person may make himself liable to third parties as a partner when in fact he has no interest in the firm. This makes him a nominal partner. He places himself in that position by such conduct as may reasonably lead others to suppose he is a partner, and induce them to trust the firm on the belief in his responsibility.

**Power.**—Each partner is a general agent of the firm within the scope of the partnership business. His power to bind the firm by his acts is confined strictly within the limits of the partnership business, and where it embraces some particular line only, a partner cannot bind his copartners in any transaction outside of their special line of business. If, for example, after forming their copartnership for mercantile business, Mr. Chapin should think there was a good chance for the firm to make money in speculating in real estate, and without his copartner's knowledge should sign the firm name to a contract for the purchase of a number of lots, the firm would not be bound. Being in trade, he may bind the firm by contracts of purchase and sale, and in all contracts that, according to the general course of dealing, have reference to the business transacted by the firm. Outside of that he cannot. A partner may receive payment of the debts; and he may compromise and discharge debts due to the firm; he may begin legal proceedings in the name of the firm, and represent the firm in all matters arising in the course of the litigation; he may bind the firm by a misrepresentation in the sale or purchase of property.

In the case of a partnership for a general business, each partner has the right to make, accept, or endorse negotiable paper for the firm. It is one of the incidents of the business, and it will always be presumed that it is done on the partnership account. Hence the firm will be liable for money borrowed in its name by one partner, although he should immediately appropriate it to his individual use. But if the person loaning such partner the money knew it was not to be used for partnership purposes, he could not hold the firm for the indebtedness.

**Limitations of Power.**—Two rules have been laid down covering specific acts that a partner can not do. They are designed to protect the firm against the misappropriation of its credit, and may be stated as follows: (1) A partner cannot use the property or credit of the firm for his individual benefit; and he cannot bind the firm by giving its note or delivering its property in payment of his individual debt. (2) A partner cannot bind a firm by a contract of surety or guaranty

unless it is shown that the other partners assented to the act. As in all cases of restricted powers of a partner, these rules do not apply where the other partners consent to the transaction or adopt it after it has been entered into. Their consent makes it their joint act; and this consent may be proved by showing that they have been accustomed to do the same thing.

**Agreements Between Partners.**—In forming a partnership, the parties may agree upon any plan of operation they may choose. They may agree upon the duties that each shall perform, as is shown in the form of articles of copartnership already given, and upon the consent necessary in making debts and giving credit. Between themselves these provisions are binding; but they are not so as to third parties dealing with the firm, without knowledge of their existence. Partners cannot limit their liability to third parties by any agreement they may make among themselves, because the public is not presumed to have notice of the actual relation existing between them, and therefore cannot be bound by it. Hence persons dealing with the firm have a right to consider the members as ordinary partners.

As between the partners these private agreements are valid, and where one partner acts contrary to any such private contract, he is liable to his copartner for the damages resulting from such breach. The remedy of the other partners against one who breaks his agreement depends upon circumstances. If actual damages can be proved they can, of course, be recovered from a partner the same as from any one else. When a partner engages in another business, and uses the partnership funds in carrying it on, contrary to their copartnership agreement, the other partners may, if they choose, have such new business and its profits treated as belonging to the firm.

**Community of Profits.**—The most important condition of the formation of a copartnership is the sharing of profits by the partners. No partnership can arise unless the element of profit is present, and there is a sharing of such profits; hence this sharing of profits has been laid down, as the first test in determining whether or not a partnership actually exists in any given case. But here again arises a distinction. While it is true that every actual partner must share in the profits, it is not true that every one who shares in the profits is a partner. A person does not become a partner in a business from the mere fact that he is to receive as a compensation for his services a share of the profits, when he has no interest or property in the capital, and acts under orders—when in fact he is merely a clerk or agent. Whenever a party has contracted for a share of the profits, as profits, so as to

entitle him to an accounting and a proprietary interest in the profits, he is a partner; but when he has agreed for a remuneration in proportion to the profits, or out of the profits, without any interest in the capital stock or credits, then he is not a partner. Where there is no agreement showing how the profits shall be divided, the presumption is that they are to be divided equally, but it is a very common thing for the articles of copartnership to provide for a different division.

**Ownership of Capital.**—In the form of articles of copartnership given, one partner contributes money only while the other puts in his stock of goods, lease of store, and good-will of the business, and these at once become the joint property of both partners, and constitute the capital of the partnership. But it is not always the case that the partners are such joint owners of the capital stock, although the presumption is in all partnerships that the partners contribute towards the capital. It often happens, however, that the contribution of one partner consists of his labor, skill or experience in conducting some particular branch of business, while the other partner or partners furnish the money or property required in the joint undertaking. In that case it is commonly said that one puts in his skill and experience against the money or property of the other. Nor is it necessary when each partner contributes a portion of the actual capital that the same should become the joint property of the firm. In the form given, the partners, each of whom perhaps owns a span of horses, might agree to put them in for the use of the firm, in addition to the other capital agreed to be contributed, though retaining their individual ownership of the animals.

**Sharing of Losses.**—Although it is usually agreed in the formation of a partnership that both profits and losses shall be shared, it may be agreed that one partner shall have his share of the profits and not be liable for the losses, and this agreement will be binding between the partners. They may make any agreement among themselves that they please. But no such agreement will prevent a partner from being liable for the debts of the partnership, unless the creditor knew of this agreement between the partners when the debt was contracted.

**Liability.**—The theory of the law of partnership is that every act of a partner is the act of the firm, and every obligation incurred by one member of the firm becomes the obligation of each. In a general partnership each partner is individually liable for all the debts of the firm. If the property of the firm is not sufficient to pay its debts, then the private property of a member may be taken to satisfy the claims of the creditors of the firm. As we have seen, limited partners are only liable for the amount of their share of the firm property.

**Suits at Law.**—Although partnerships, in a certain sense, are considered and do business in the firm name as a single individual, they are not so considered to the extent that they can sue or be sued as an individual. A partnership has the power to bring a suit but such suit must be brought, not in the firm name, but in the name of all the individuals composing it. So if a person desires to bring suit against a partnership he must sue the individuals together that compose it.

#### QUESTIONS.

Who may enter into a partnership? What classes of partners are there? Define each? What power has a partner over the partnership business? What can he not do? What is said of agreements between the partners? What is said of community of profits? of ownership of capital? of sharing of losses? Give the liability of general partners for the firm's debts? How may a firm sue and be sued?

## CHAPTER XXX.

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### PARTNERSHIP.

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#### DISSOLUTION.

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**Duration.**—The duration of a copartnership is entirely a matter of agreement, if the parties choose to make it so. Hence if a limit is fixed for its duration it will be presumed to continue until such period has elapsed. In case the partnership is formed for some particular enterprise, then its duration will be implied until the particular business for which it was formed is finished. Where no time is fixed either by agreement or implication, then the partnership will be presumed to continue at the pleasure of the parties, and either one may dissolve it by notice at any moment. In the absence of such notice, it may continue during the lives of the partners, but the law will not presume in any case its longer continuance.

**Dissolution** of a partnership can be had only in some legal way, for some legal cause. The conditions warranting a legal dissolution or termination of a partnership may, for convenience of discussion, be grouped under four general heads. A dissolution may take place (1) by agreement of all the partners ; (2) by act of one of the partners ; (3) by a decree of a court ; (4) by operation of law.

**Dissolution by Agreement** of all the partners is the common method of terminating a partnership. Having formed the partnership of their own choice, they are naturally entitled to terminate it as freely as they formed it. The consent to its termination must be on the part of all the partners, or it cannot be dissolved by agreement. The dissolution of a partnership by agreement may be accomplished in three ways: (1) by agreement in the contract or articles of copartnership ; (2) by an agreement subsequently entered into ; and (3) by an implied agreement.

**In the Contract.**—It is usual, whenever formal articles of copartnership are prepared, to insert a clause specifying the duration of the partnership. At the expiration of the specified period, the partnership is

terminated and dissolved without further formality. Even if the partnership contract is not reduced to writing, the partners usually have an understanding as to how long it is to continue, and where this is the case the dissolution is accomplished at the expiration of the time unless it is continued by agreement.

**Subsequent Agreement.**—When no time for dissolution is fixed upon at the formation of the partnership, the partners may subsequently agree upon a time, and if the time was fixed in the contract forming the partnership it may be altered by subsequent agreement.

**Implied Agreement.**—When the partnership is formed for the transaction of some particular business, there is an implied agreement, in the absence of an express agreement, that the partnership shall end when the entire business is completed. Upon the accomplishment of the business, a dissolution occurs without any formal act of the parties. And moreover, the business of the partnership may have to do with some definite subject matter; as, the working of a mine. If the mine were swallowed up by the sea and wholly destroyed, the partnership would end though no express agreement to that effect were made.

**Act of a Partner.**—While the mere desire of one partner, without the consent of the other, will not work a dissolution, yet one partner by affirmative act, may dissolve the partnership. He may do this by assigning all his interest, or by renouncing the contract in some affirmative way.

**Assignment of Interest.**—If one partner sells, or in any other way transfers, or assigns, his interest in the business, dissolution is the immediate result, for the remaining partners are not bound to accept the purchaser as a partner in place of the one who assigned his interest, nor is the purchaser bound to become a partner. He is the owner of an undivided interest in the partnership property in common with the others, and can demand that the partnership affairs be immediately closed up and he be paid his purchased interest.

**Renunciation.**—When no time for the duration of the partnership has been agreed upon, it is called a partnership at will, and one or more of the partners may dissolve it at pleasure by express renunciation. There is said to be a dissolution by tacit renunciation when one partner withdraws from participation in the business and engages in other affairs, or refuses to act with his copartners, or does some affirmative act inconsistent with the partnership agreement. But if he takes either of these courses before the expiration of the period fixed for the duration of the partnership, in case a period has been agreed upon, he makes himself liable to his copartners for damages which they may suffer by his breach of contract.

**Decree of a Court** is the third general method of dissolving a partnership. It is the course generally resorted to by one or more partners in case of a quarrel or disagreement, and an amicable dissolution and settlement of the affairs of the firm cannot be had.

**Grounds for a Decree.**—There are certain well recognized causes for which a court of equity will decree a dissolution of partnership. The most important of these are as follows: (1) Improper and fraudulent conduct on the part of one or more of the partners; (2) such a violation of the articles of partnership as would defeat the purposes and objects of the firm; (3) the exclusion of a partner from his just share in the management of the business of the firm; (4) continued quarreling between partners, rendering the successful prosecution of the business impracticable; (5) intemperance, dissipation or gross immorality of one of the partners, such as to impair the credit of the firm or injure its business; (6) inability of a partner by reason of permanent illness, or from any cause to perform his part of the contract.

**Operation of Law.**—This is the fourth and last of the general heads under which the circumstances causing or authorizing the dissolution of a partnership are grouped. By operation of law is meant that when the facts or events which we shall proceed to mention, exist or happen, then a dissolution of the partnership legally results, without any affirmative act by either of the partners.

**What Events Operate as a Dissolution.**—A partnership is immediately dissolved by operation of law: (1) Upon the death of a partner. (2) Upon one of the partners becoming insane or imbecile. (3) Upon the marriage of a female partner, since by the common law all her property and interests were transferred to her husband, and she could no longer continue in business; but this doctrine has been so generally abrogated by statute as to do away practically with this cause of dissolution. (4) Upon the sale of a partner's interest upon execution issued against his property. (5) Upon the bankruptcy of a partner, as thereupon his interest in the partnership is supposed to have become vested in his creditors. (6) Upon the breaking out of war between the different countries where the partners reside, and between which they carry on business. They are then alien enemies and cannot contract with each other. (7) And finally upon the happening of any event which severs the unity of interest, which the law presumes to exist between partners.

**Results of Dissolution.**—Immediately on dissolution of the partnership the relations of the parties as partners are at an end, and the rule is that one partner cannot by any act bind the firm, as to any new transaction; but this supposes that the person with whom the transaction

occurs knows of the dissolution. It follows, therefore, that notice of the dissolution should be given. It is usual to mail a circular notice to all persons with whom the firm has dealings, and also to insert a notice of dissolution in the advertising columns of one of the local newspapers, so as to inform the general public, although it is not necessary to give notice of the dissolution to those who have had no dealings with the firm. The following is a convenient form for giving notice of the dissolution:

#### NOTICE OF DISSOLUTION.

*Notice is hereby given that the copartnership heretofore existing under the firm name of Martin & Bly, at Chicago, Ill., is this day dissolved. All accounts due the firm are to be paid to Myron T. Bly, and all liabilities should be presented to him for payment.*

*Dated Chicago, Ill., August 16, 1892.*

PRYOR F. MARTIN,  
MYRON T. BLY.

This notice may be sent to persons with whom the firm has been doing business, or it may be published in a paper, or both.

**Powers of the Partners After Dissolution.**—The only powers of the partners after dissolution, relate to the winding up of the affairs of the firm, and are sometimes termed powers in liquidation. For the purpose of liquidating the affairs of the firm, and securing the individual rights of the partners in the assets, the partnership may be said to continue. When a partnership is dissolved by consent, it is customary to appoint one of the partners to collect the outstanding accounts, and discharge the liabilities. In the absence of such appointment, either of the partners may collect debts, settle and adjust accounts, and pay creditors. Each has a right to have the partnership assets first applied toward the firm liability before any sharing or division among themselves is made. If there should be a surplus after the liabilities are discharged, then each is entitled to his share, to be estimated according to the provisions of the agreement, or in the absence of the agreement according to the amount of capital which he contributed.

#### QUESTIONS.

How may a partnership be dissolved? What is a dissolution by agreement? How may it be expressed? What is said of its expression in the contract? What is said of subsequent agreement? Of implied agreement? What is said of dissolution by act of a partner? What

acts will work a dissolution? What is said of dissolution by decree of court? What are the grounds for such a decree? What is a dissolution by operation of law? What events operate as a dissolution? What is said of notice of dissolution? How is it given? Why and to whom? What power has a partner after dissolution? How is the firm's business settled up?

## CHAPTER XXXI.

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### JOINT-STOCK COMPANIES.

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**Definition.**—Joint-stock companies are associations formed for the transaction of various kinds of business. They are in fact partnerships, and are so considered in law; but they differ from the ordinary forms of partnership in their organization. These companies were formerly more common in this country than they are at the present time. Since the enactment of general laws by the legislatures of most or all of our states, under which corporations may be quickly and easily organized, they have almost entirely taken the place of joint-stock companies. Formerly it was necessary in the organization of every corporation to procure a charter from the legislature. This usually involved much delay, and not infrequently large expense, and rather than await the result of such special legislation, the persons interested in the proposed business or undertaking would risk the responsibilities of partners.

**How Formed.**—The joint-stock company has been usually adopted in preference to the ordinary partnership where the number of the persons interested is so large as to make it very inconvenient to conduct the business as is commonly done by copartners. It often has as complete an organization as a corporation. The stockholders forming the association enter into articles of agreement, which regulate and define the rights of the members among themselves. These articles provide for the manner of forming the company; the amount of the capital stock; the number of shares and the amount of each; the manner of transferring the stock; and the election or appointment of officers and agents. They also provide for the management of the business of the company, and include all other provisions considered necessary or proper for conducting its affairs.

**Liability of Stockholders.**—Ordinarily the members or stockholders are personally liable for the debts of the company, the same as copartners for the indebtedness of the firm. That is, if the assets of the company are exhausted and there are debts yet remaining unpaid, each stockholder is liable to the creditors for the full amount of such debts. When no statutory provisions exist regulating the liability of members, it

is determined upon the same principles, and in the same manner, as in the case of ordinary partners.

In some states the formation of these companies and the liability of their members is regulated by statute, and they are given certain corporate privileges. In New York a joint-stock company may sue and be sued in the name of its President or Treasurer, and the members are not individually liable until a judgment has been recovered against the company, and an execution issued thereunder has been returned unsatisfied. These companies are not dissolved by the death of a member, or by a sale or transfer of his stock, as is the case in an ordinary partnership. A joint-stock company is said to be more than a partnership and less than a corporation—it is in fact an intermediate stage in the development of the former into the latter.

**Business, How Conducted.**—Usually the business of the company is transacted by trustees or directors chosen for that purpose by the stockholders. On a dissolution these managers usually become, under the articles of agreement, trustees to convert the assets of the company into money, and distribute the same among the members. While the company is treated in law as a partnership, yet the shareholders have different, and in some cases greater, rights than copartners.

**Voluntary Clubs.**—Many voluntary clubs or associations, such as lodges of Free Masons and Odd Fellows, are in form joint-stock companies. Where such is the case they cannot be sued in that capacity, but the members may be proceeded against individually. Many clubs of this kind are now regularly incorporated, the tendency being in that direction, the same as in the case of business enterprises.

### QUESTIONS.

What are joint stock companies? How are they considered in law? How do they differ from ordinary partnerships? Why were they organized? How do they differ from partnerships? What is the liability of stockholders? What effect has the death of a stockholder? What position is a joint stock company said to occupy with reference to partnership and corporation? How is the business of these companies conducted? Have shareholders any different rights from partners? What is the tendency in the formation of companies? Why?

## CHAPTER XXXII.

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### CORPORATIONS.

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#### KINDS, ORGANIZATION, AND DISSOLUTION.

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**Importance and Object.**—Corporations have already become very numerous in this country, and they are multiplying rapidly from year to year. They were formerly confined largely to such business as banking, insurance, express and railway transportation, but recently they are taking the place of individual enterprises in mining, manufacturing, and trade; and when the additional fact of the enormous capital they represent and the power they wield is considered, the importance of the subject is sufficiently evident. To carry on the immense business enterprises of to-day requires a larger capital than can usually be furnished by single individuals, and corporations are organized to meet this need. Corporations may be either sole or aggregate.

**Sole Corporations.**—These, as the name implies, are such as consist of a single individual who possesses corporate powers. In England the sovereign, the bishops of the established church, and some other functionaries, each constitutes a sole corporation. Such corporations are organized because certain offices require a direct succession from one holder to another in order that the property belonging to them may remain in the possession of the officers, without going through the hands of executors or administrators.

**Aggregate.**—A corporation aggregate may be defined as a collection of individuals united in one body under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members one artificial being, capable of transacting some kinds of business like a natural person. A corporation is said to be an artificial person. By this we are to understand that it is an association of natural persons, who are considered and treated in law as forming a new and distinct body or individual. These natural persons are its corporators, or stockholders, but the corporation itself is a different individual—the artificial person. All business corporations are aggregate. In fact, in this country, we have

no sole corporations. Corporations aggregate may be either religious or lay.

**Religious Corporations**, sometimes called ecclesiastical, are those formed for the purpose of managing and caring for the property of churches and congregations.

**Lay Corporations.**—These include all corporations except religious, and they are divided into, (1) eleemosynary, and (2) civil.

**Eleemosynary Corporations** are those formed for charitable purposes, such as assisting the needy by way of alms, education, or otherwise, and caring for the sick and disabled. This includes hospitals and other charitable institutions, such as orphans' homes, etc., organized for the purpose of dispensing alms.

**Civil Corporations.**—These include all those organized for purposes other than charitable, and therefore comprise all, or nearly all, business corporations. They are either public or private.

**Public Corporations** are those that are created by the Government for political purposes; cities and villages are familiar illustrations of this class of corporations. They are given the power to legislate within certain limits. They may pass laws or ordinances, as they are usually called, for local purposes, such as improving streets, building bridges and sewers, regulating the sale of food products, and the like. Such ordinances have the same force as statutes of the state, but the power to make such local laws is subject to the control of the state legislature. By the statutes of most, if not all our states, counties, towns, and school districts have corporate attributes. They may take and hold property, and may sue and are liable to be sued, in their corporate capacity. While they have some of the powers and privileges of corporations they differ from them greatly in other respects. They are, therefore, called quasi corporations, which means, as if, or in a manner, corporations.

**Private Corporations** are those established or founded by private enterprise, and this is true even though the purposes and operation of such corporations partake of a public nature. For example, banks, insurance companies and railroads doing business of a public nature, are private corporations.

**How Created.**—A corporation is the offspring of the state, and derives its being and its powers from the law. Corporations are created in one of two ways, viz., (1) by charter; (2) under general statute.

**Charter.**—Where a corporation is formed by an express act of legislature it is said to be formed by charter. This act of legislature is the charter, and it provides that certain persons, whose names are embodied in it, shall constitute a corporation under some specified name with

certain specified powers. This charter when once accepted and acted upon assumes the nature of a contract between the state and the corporators ; it cannot, therefore, be impaired or altered by any subsequent act of the legislature, unless the power to alter or amend it is reserved in the charter. Hence such a corporation becomes independent of the legislature. This naturally opened the way to abuses on the part of corporations and led, in most cases, to the introduction of a clause into the charter reserving the right to the legislature to amend or repeal it. Some state constitutions forbid the legislature from passing special acts conferring corporate privileges, and provide that all corporations shall be organized under general statutes.

**General Statute.**—Recently the method of forming corporations by charter, especially those for business or manufacturing purposes, has given place almost entirely to incorporation under the statute. And this means that the legislatures of most, if not all the states and territories have now enacted general laws providing for the formation of such corporations which may be organized by compliance with the terms of these statutes. There is a great similarity among these laws so far as the main provisions are concerned. Although they differ somewhat in detail they render the formation of corporations under them a comparatively simple matter, free from the delays of the other method. The usual method is for the individuals who desire to be incorporated to ask the particular state officer for a charter. In this request the objects of the corporation, the capital stock, the place where it is to do business, and a few other things are stated. The particular officer then issues the charter organizing the company.

**Agreements to Take Stock.**—Whether a person who signs a subscription list agreeing to take stock in a corporation about to be formed is bound by his contract, is a question that has been much discussed and has been differently decided by the courts of the different states. The general result of these opinions seems to be that a simple subscription is not binding, for want of consideration. However, if the subscriber agrees to take the stock if a certain amount is raised, or authorizes those engaged in getting the subscription to incur trouble or expense on the faith of his subscription, it will be binding.

**Issue of Stock.**—The money or property subscribed and paid in or turned over to the corporation constitutes its capital or capital stock. Each subscriber's interest in this capital stock is represented by the proportion which his subscription bears to the whole. This capital stock is divided into shares of a specified value, and a certificate or certificates are issued to each stockholder representing the number of shares, or in other words the amount of stock to which he is entitled.

For example, the capital stock of the Eastman Company is five millions of dollars, divided into fifty thousand shares, of the par value of one hundred dollars each. Now, if Rollin Steward had subscribed ten thousand dollars he would be entitled to one hundred shares of stock. The following would be a proper form of certificate for the company to issue him:

CERTIFICATE OF STOCK.

INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK.		
{ No. 10. }	<b>THE EASTMAN</b>	{ 100 SHARES. }
<b>DRY PLATE AND FILM COMPANY.</b>		
Capital, \$5,000,000.		Shares, \$100 each.
<p><i>THIS IS TO CERTIFY, That Rollin Steward is entitled to one hundred shares of the Capital Stock of THE EASTMAN DRY PLATE AND FILM COMPANY, of Rochester, N. Y., transferable only on the books of the Company, in accordance with the By-Laws thereof, in person or by attorney, on the surrender of this Certificate.</i></p> <p style="text-align: center;">WITNESS, the Seal of the Company and the signatures of its President and Treasurer.</p> <p style="text-align: center;">Rochester, N. Y., September 10, 1892.</p> <div style="display: flex; justify-content: space-between;"> <span>HENRY A. STRONG, President.</span> <span>GEORGE EASTMAN, Treasurer.</span> </div>		

Or if he chose he might have the amount divided and issued to him in several certificates.

The stock is issued as soon as it is placed upon the books of the corporation in the name of the subscriber. Simply delivering the certificate, or script as it is sometimes called, is a mere matter of form—it is not required to perfect the subscriber's title. In declaring dividends, corporations are governed by their books in determining to whom they are payable. When a dividend is declared payable in general terms, it is payable to each stockholder. The script is evidence of title—it is not the title itself—hence the identity of any given number of shares is not changed by the surrender of the certificates and the issuing of new ones in another name.

**Transfer of Stock.**—The shares of stock are personal property, the same as a promissory note or a horse, hence the owner may sell and transfer them at his pleasure. But since the certificate is only evidence of the owner's title, this transfer must be made upon the books of the corporation. In order to do this, the seller writes across the back of the certificate or script, a brief bill of sale and power of attorney, authorizing the transfer to the buyer. Suppose Mr. Steward sells his stock represented by the certificate shown in the preceding form to Nelson

Stevens, he would, before delivering it, make thereon substantially the following:

ASSIGNMENT OF STOCK.

*FOR VALUE RECEIVED, I hereby sell, assign, and transfer unto Nelson Stevens, one hundred shares of the capital stock of the Eastman Dry Plate and Film Company, represented by the within certificate, and do hereby irrevocably constitute and appoint George Eastman my attorney to transfer the said stock on the books of the within named company, with full power of substitution in the premises.*

*Dated Oct. 5, 1892.*

*ROLLIN STEWARD.*

*In presence of*

*WARREN JONES, Rochester, N. Y.*

The buyer presents the certificate thus indorsed, to the proper officer of the corporation—usually the Secretary—who thereupon cancels and preserves it for future reference, and issues another certificate, or certificates, in its place, to the new owner of the stock, after making the proper entries on his book showing the transfer.

**By What Law Governed.**—A corporation created in one state may make contracts in another unless prohibited by laws of the latter, and it may sue in any state where it has rights or interests to defend. Its property and all its transactions are subject to the law of the state in which it assumes to do business. A corporation is supposed to reside where it carries on business. If it has several places of business within the state under whose laws it was incorporated then it has a residence at each. Corporations are allowed to transact lawful business almost everywhere. There are in most states statutes providing for the transaction of business within their territory by foreign corporations.

**Dissolution.**—There are several ways in which corporations may be dissolved. The following are the ordinary methods, though they are not all applicable, as we shall see, to every corporation. They are (1) by limitation, (2) by act of the legislature, (3) by surrender of their rights to the state or government, and (4) by forfeiture of franchise.

**Limitation.**—This, of course, applies only to corporations that are incorporated for a specified time, as are most of those more recently organized for commercial purposes. The time of the duration of such a corporation is limited by its charter, or the general statute, and in either case when that time has elapsed it is dissolved by limitation.

**Act of the Legislature.**—Public corporations, such as towns, counties, villages, and cities, created for governmental purposes, may be modified or dissolved at any time by the same power that created them, that is by the legislature. But such dissolution cannot be made to

destroy or abridge the rights of third parties against the corporation, nor their interest in its property. The charter of a private corporation, however, as has been said, is a contract between the governing power and the incorporators, and hence unless the authority has been expressly reserved in the charter of a corporation, or the general law under which it was incorporated, the legislature is powerless to pass an act dissolving it.

**Surrender of Rights.**—Any private corporation may be dissolved by surrendering its franchise, that is, the rights and privileges possessed by it, to the state or government, but such dissolution will not be complete until the state or government has formally accepted the surrender.

**Forfeiture of Franchise.**—Corporations may forfeit all their rights and privileges by a wrong use of them, called misuser, or by a failure to use them, called nonuser, and either may result in dissolution. There is always a question in each particular case as to what degree of abuse will result in forfeiture, and this as well as the failure to use the franchise, must be determined by a court of law before the corporation will be actually dissolved.

**Effect of Dissolution.**—The general practice now is, in case of the dissolution of a corporation, for the court to appoint a person called a receiver to settle its affairs. It is his duty to take charge of all the corporate property, to dispose of it, and devote the proceeds after paying the expenses of receivership, to the satisfaction of the debts of the corporation, and if any balance remain, to divide it among the stockholders in proportion to their stock.

### QUESTIONS.

What is said of the importance of corporations? of their object? Define sole corporation; corporations aggregate. Define religious corporations; lay; eleemosynary; civil; public; private. In what ways may corporations be created? What is said of each? What is said of agreements to take stock? What is the capital stock of a corporation? How issued? How transferred? By what law are corporations governed? How may corporations be dissolved? What is said of each way? What is the effect of dissolution?

## CHAPTER XXXIII.

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### CORPORATIONS.

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#### POWERS AND LIABILITIES.

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**Extent.**—At common law every corporation has certain powers, the most important of which are as follows: (1) to make contracts; (2) to have succession; (3) to sue and be sued; (4) to make and use a common seal; (5) to purchase, hold and convey property; (6) to appoint its officers and agents; (7) to make by-laws.

**Power and Mode of Contracting.**—As we have seen, the rule is that individuals have the largest liberty in contracting, and may enter into all contracts, except only such as are illegal. In the case of corporations the rule is different. They can only contract within the scope of their corporate business—within the powers given to them by their charter, or by the law under which they are organized. For example, a banking corporation cannot enter into a contract for the building of railroads, nor can a corporation formed for the manufacture of mowing machines enter into a contract to build steamboats.

**Succession.**—This is implied in the definition of a corporation, and is the first essential of its existence. It means that the corporation continues until the end of the term for which it was organized. When an officer dies, or is removed, a successor is elected or appointed, and when a stockholder sells his stock, or dies, his interests pass into the hands of some one who succeeds him. Thus while a partnership is dissolved by the death or bankruptcy of a member of the firm, or a sale of his interest in the business, a corporation survives all such changes within its body by means of this capacity of succession. When the term of a corporation's existence is not limited by its charter, or by law, it has perpetual succession—it is said to be immortal. If the state, in granting a charter, reserves the right to alter or repeal it, the corporation does not have a right to perpetual succession, because its continued existence depends upon the will of the legislature. The rule is the same where the right to alter or repeal it is reserved in the law under which it is organized.

**Suits.**—The right to sue and be sued is essential to the defence of the rights of a corporation. Without such a capacity it could not maintain its existence. It must bring its actions in its corporate name, and it must be sued under the same name. It differs from a partnership in this respect, since a partnership must sue and be sued in the names of its individual members.

**Corporate Seal.**—The right to make, alter and use a common seal is one of the incidental powers of a corporation. Under the common law it was supposed that a corporation aggregate could not manifest its intentions through natural agencies, as personal acts or oral discourse, but that this could only be done in an artificial way by the use of its seal. The use of a seal, as we have seen, is very ancient. It had been in use before the formation of corporations, and was simply adopted by them. The use of a seal by corporations is only necessary now in the performance of such acts as are required by law to be done under seal, such as the conveyance of real estate. When used, a corporate seal has the same legal effect as an individual seal; for example, if it be affixed to a note, the instrument becomes a bond.

**Property.**—The power to purchase and convey property is limited only by the terms of the charter or statute. Where there is no such limitation a corporation has, as far as amount is concerned, the same right to take, hold, and convey real and personal property as a natural person. In many cases the amount of property which a corporation may acquire, hold and convey, is restricted by law as well as the purposes to which it may be applied. The capacity of a religious corporation or a railroad company to take real estate and other property is usually limited to the purposes of its organization. If the value of property acquired by a corporation be within the limits fixed by its charter, or the statute, and afterwards increases beyond that limit this will not affect the title of the corporation. Where a corporation exceeds its powers in making a purchase of property which it actually receives and uses or sells, it cannot interpose its want of power as a defence to a suit against it for the purchase price, or to defeat the title of its grantees. But where the corporation exceeds its powers, its contract is void so long as it remains executory.

**Restrictions.**—The general rule is that corporations may sell and convey their property as freely as individuals, and in the same manner. This, however, has been restricted in the case of religious corporations. They must procure an order of the court authorizing the sale and conveyance of real estate, before they can make a valid transfer of property. Some states, however, have abolished this restriction by statute. When a corporation acquires real or personal property by purchase, it acquires

an absolute title; but the rule is that where it acquires real estate under the statute for a particular purpose, the title will revert to the original owner as soon as that particular use of the ground ceases. Where a railroad takes private property for its road-bed, and afterwards ceases to use it for that purpose, the original owners of the land are entitled to it—it reverts to them.

**Officers.**—A corporation has the right to choose its managers or directors, and appoint and pay its subordinate officers and agents. The charter or general law under which the corporation is organized generally prescribes the mode in which the directors shall be chosen. In that case the election must be held at the time and place prescribed, and upon the notice required. When the charter or general act provides for an election in the manner to be prescribed in the by-laws, these are thus made the law of election. Generally a stockholder has one vote for each share of stock which he owns. He votes upon the stock standing in his name upon the books of the corporation, whether he holds it in his own right or as a trustee; but no one has a right to vote upon stock irregularly issued, or owned by the corporation itself, even though it stands in the name of an individual as trustee. This right to vote may generally be exercised by proxy; that is, the stockholder may give a written power of attorney, or as it is generally called, a proxy to vote, to some person who is thereby authorized, upon filing this document with a proper officer, to vote for the absent stockholder. The following is the usual form for such proxy.

*Know all Men by These Presents, That I, George M. Sternberg, do hereby constitute and appoint Henry S. Miller my attorney and agent for and in my name, place and stead, to vote as my proxy at any election of directors of the Rochester Land and Stock Company, Limited, according to the number of votes I should be entitled to vote if personally present.*

*In Witness Whereof, I have hereunto set my hand and seal at the city of Rochester, N. Y., this fourth day of August, one thousand eight hundred and ninety-two.*

GEORGE M. STERNBERG. [SEAL].

Signed and delivered in }  
the presence of }

T. D. SNYDER,

Rochester, N. Y.

The right to vote belongs to every stockholder, and yet it does not depend exclusively upon such ownership. Churches and other religious societies have no stockholders, and yet the corporators have the right to vote in an election of officers.

**Duties of Officers.**—A corporation must act through its officers, and hence the power of a stockholder is exhausted in electing the officers. A stockholder has not, usually, any further concern in the transaction of the corporate business. The directors are the representatives of the corporation, and have full power to do business to the extent of corporate power, subject, of course, to the directions of stockholders given in the form of by-laws. The corporation must act in the manner prescribed by its charter, or by the general law, and therefore, if it be required, for example, to contract in some particular way, its agreement made otherwise is illegal and void. The directors of a corporation are trustees of its property, and its stockholders may hold them liable for any bad faith in the use of its funds.

**Amotion.**—The right of amotion, or removal of an officer from office, was formerly considered one of the incidental powers of a corporation; but the old rule and the old conditions are not now of much importance, because corporations in this country are, for the most part, so organized that the officers are chosen, and the corporate affairs managed as prescribed by statute. Even where this is not the case, and the officers hold for a definite term, they cannot be removed in a summary way. The directors of a corporation are usually chosen for the term of one year. They hold for that term and may vindicate their rights in an action. Officers, like the cashier or teller of a bank, appointed for an indefinite term, may be removed at any time.

**Disfranchisement,** or expulsion of a member from the corporation, is sometimes permitted. It is, however, a severe measure which deprives a member of his interest in the corporation, and hence the existence of the right will not be readily presumed. It can only be resorted to where the power is expressly given by charter, or necessarily implied from the nature of the corporation. Generally the right only exists in the case of churches, lodges, and other such organizations, where the members of the corporation do not hold stock.

**By-Laws.**—The power to make by-laws is usually expressly given by charter or general statute, but where it is not so given, it is understood. These by-laws are the rules or laws laid down by the corporation for its own government. They provide in general the methods of transacting its business, as well as for the regulation of its own internal affairs. The power to make by-laws is in some cases given to the directors, and in others to the corporation. In the latter case, they are passed upon and adopted by the corporators or stockholders. The by-laws must be consistent with the law of the land, otherwise they will be void. They must also be consistent with the charter of the corporation and they must be reasonable and capable of enforcement.

**Liability of Stockholders.**—Under the common law, the members of a private corporation were not liable for corporate debts or obligations. If the corporation became bankrupt, they would, of course, lose all they had invested in its stock, but farther than that they incurred no liability. This rule of liability remains in force wherever it has not been modified by special charter or statute provisions. In many of the states, however, such modifications have been made, in some cases making a stockholder individually liable for all the debts of the corporation, the same as a partner is responsible for the firm debts. Usually, however, a stockholder is liable for the amount he has invested, that is his stock and an amount equivalent to his stock. For example, a person holding five thousand dollars' worth of stock, upon the insolvency of the corporation, not only loses the stock, but he is in addition to that personally liable for the corporate debts to the amount of five thousand dollars.

#### QUESTIONS.

What powers have corporations? What is said of succession? of their right to sue and be sued? of the corporate seal? of their power to purchase and convey property? What restrictions are there on this power? What is said of choosing officers? voting by proxy? What are the duties of officers? What is amotion? disfranchisement? when exercised? What is said of the power to make by-laws? What restrictions are there on this power? What is said of the liability of stockholders for the corporate debts?

## CHAPTER XXXIV.

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### FIRE INSURANCE.

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**Definition.**—In this form of contract the insurer, for a certain premium, insures the applicant against loss or damage to certain premises by fire, for a specified time, and to the amount named in the policy. The insurer in some cases reserves the right to repair or rebuild, and so make good the loss of the insured.

**Insurable Interest.**—The policy holder must have an insurable interest in the thing insured, in order to make the contract valid. By this is meant such an interest that he will suffer a pecuniary loss in case of fire. It does not follow, however, that only one person may have the same property insured, because the law permits the ownership of distinct interests in the same thing, and each owner may protect his own interest by insurance. Thus, the owner of a building, having had it insured, subsequently mortgages the building, and the mortgagee may have it insured to protect his interest; after that the owner enters into a land contract by which he agrees to sell the building to a third party who, after paying him part of the purchase price, obtains an interest in the premises, which he may have insured. A person who is merely entitled to the rent or occupancy of premises may have them insured. The total of insurable interests cannot amount in any case to more than the value of the premises.

**The Policy.**—This is the contract between the insurer and the insured. The business of insurance is done by large companies, each having its own printed policy, and therefore it is not thought advisable to insert a form of policy here. Each policy usually contains a large number of conditions and restrictions which the insured assents to by accepting it. It is interpreted and enforced like any other agreement. In this contract the parties must agree in regard to the following essential elements, viz.: (1) the premises and risk, (2) the amount insured, (3) the time the insurance is to continue, and (4) the premium.

**The Premises.**—The policy must contain a description of the premises insured. This usually includes a statement of the facts relating to the material of the building, the means of heating and lighting, the material of which the roof is composed, the title or interest of the insured, the liens existing upon it, to what use it is put, its distance from

other buildings, and of what material such adjacent structures are composed; and if it be personal property that is to be insured, then its nature and value, and the nature and character of the building in which it is contained; and in either case what, if any, other insurance is in existence covering the same property.

**The Risk** is ordinarily the danger of loss or damage. In fire insurance policies the risk is the danger of loss or damage by fire, but in most policies there is added a clause insuring against lightning, and recently in some of the western states it has become quite common to insert a provision protecting the insured against loss or damage resulting from tornados and other storms. The protection against loss or damage by fire includes not only the loss resulting from the actual work of the fire, but also all damage caused in putting out or controlling the fire. The damages caused by the use of water in such cases are often greater than those resulting from the actual burning. If there be no clause in the policy insuring against lightning, there will be no protection for the insured against damages resulting from that cause, unless the property or building be actually set on fire by the lightning.

In the absence of fraud the law only regards the immediate cause of the loss, so that even though the owner were guilty of gross negligence in permitting the fire, this would not relieve the insurer from liability for the loss.

Insurance companies usually introduce into their policies a clause excepting them from liability for damages resulting from fire caused by "invasion, foreign enemy, or any military or usurped power whatsoever," and sometimes adding also "or by riot or civil commotion."

**Change of Risk.**—A policy of insurance being issued upon the basis of a certain degree of danger, for which the insured pays a premium designed to be proportioned to the risk, it follows that if the danger be increased, the risk, and therefore the premium, must be correspondingly greater. If then the insured does anything whereby the hazard of the insurer is increased without his consent, it amounts to a change of the contract which will render it void. Any alteration in the building insured, by way of additions or repairs, and in its surroundings by the erection of other structures, changes the risk, and may, if it be thus increased, make the policy void. So does a change in the occupancy, ownership, or use of the building; and in the case of personal property the changing of its location. The insured in all such cases should therefore have the consent of the insurer to any changes or alterations of that kind.

Where a building is insured to be used in carrying on a particular business, the insured is at liberty to use the ordinary materials in

its prosecution. The insurer is supposed to be acquainted with the business.

**Amount Insured.**—The amount for which an insurance policy is issued is merely a maximum, that is the largest amount for which the company can be made liable. It is a full protection to the property to the amount of the policy, and if the loss be the same or less in amount, it is paid in full; but if it be greater, no matter how much greater, the owner will receive under his policy no more than the amount named in it. For example, if a building worth \$3,000 and insured for \$2,000 is damaged by fire, to the extent of \$2,000, or any less sum, the insured will receive the amount of his actual loss, but if the building be totally destroyed, he can recover only \$2,000. In case the owner suffers a partial loss, and the company pays him any sum less than the full amount for which it had insured the property, the policy continues in force only as to the balance for the remainder of the time. Thus, if in the preceding example the building were damaged, to the amount of \$500, which the company paid, it would only be liable under that policy for subsequent loss to the extent of \$1,500.

Buildings may be valued or appraised before insurance, and where this is done without fraud, and the value agreed upon by the parties, both insurer and insured will be bound by it. If, however, the amount stated in the policy is plainly more than the value of the property, it will be evidence of fraud, and the company will be bound to pay only the actual value.

**Insurance in Other Companies.**—Most insurance companies will not issue a policy above a certain fixed sum, which differs in the different companies, and they will issue only one covering the same property. Hence, if one owns a valuable building, he must ordinarily have it insured in several different companies, in order to protect his interests. In such a case, if the building be damaged by fire to the amount of all the insurance, then each company must pay the full amount of its policy. On the other hand, if the loss be less, then each company pays that proportion thereof, which the amount of its policy bears to the whole amount of the insurance. For example, a building is insured in one company for \$2,000, in another for \$6,000, and in a third for \$10,000. A fire damages the premises to the extent of \$9,000; the first company must pay \$1,000, the second \$3,000, and the third \$5,000, while, if the loss had been \$18,000, each must have paid the full amount of its policy. This rule is not affected by the relative dates upon which the policies were issued. If one had been in force one year at the time of the fire and another one day, the liability of the companies would not be varied by that fact.

So far as the owner is concerned, he need not usually resort to all the companies for their proportionate share, but if any one policy is sufficient to cover his loss, he may collect the full amount from the company which issued it. In that case, however, the company paying the full amount of loss may collect its proportion from the other companies that have outstanding policies covering the property destroyed. The same rule of contribution applies, as in the case of co-sureties. Some companies have a condition embodied in the policies, providing that in case of loss, the insured shall not receive, on such policy, any greater proportion of the damage sustained than the amount thus insured shall bear to the whole amount of insurance on the same property. In that case the insured must comply with the condition, and can only collect from the company its proportion of the loss.

**The Time the Insurance is to Continue.**—This is always particularly specified in the contract even to the exact hour of the day, which is usually twelve o'clock, M. Fire insurance policies are ordinarily made for one, two or three years, but occasionally they are made for longer or shorter periods. It is the custom of insurance agents to notify their patrons of the expiration of policies held by them. When the term of a policy expires and the holder desires the same protection continued, the agent either issues an entirely new policy or attaches to the old one a renewal. This renewal is a brief contract executed by the proper officers of the company acknowledging receipt of the premium and in consideration thereof, in terms renewing for a specified time the former policy, which is usually referred to and described by its number. These renewals like the policies are printed forms provided in all cases by the company.

**Surrender of Policies.**—Most, if not all, insurance companies now permit their policies to be surrendered at any time, and repay to the holders a certain percentage of the premiums. This repayment of premiums is made upon a fixed scale, and is somewhat less than the proportionable amount for the unexpired term of the policy. The amount which a company will pay for an unexpired policy is called its surrender value.

**The Premium.**—The amount which is paid for insurance is the premium. It is the consideration upon which the company undertakes to protect the owner's interest in the thing insured, and is always stated in the policy. Its amount varies with the risk, and is supposed in each case to be exactly proportioned to the probabilities of loss from fire or other cause against which protection is given.

**Representations and Warranties.**—In applications for insurance, the company always requires statements to be made with regard to many

things which will affect the risk. The things most commonly stated are the material of which the building is made, its surroundings, such as distance from other buildings, and the material of which they are composed, the manner in which the building is heated and lighted, the purpose for which it is used, etc. If these statements are not made a part of the contract, they are representations; and if made according to the best of the applicant's knowledge and belief, and without fraud, the policy will be binding even though the representations be not all absolutely correct. Most insurance companies now make the statements regarding the property contained in the application a part of the policy. They then become warranties, and if they are not true, whether knowingly false or not, it will avoid the policy. In order to avoid the policy, however, the warranty which is false must affect the risk. Such an incorrectness as does not in any way change the risk will not have this effect.

**Conditions.**—The simple contract of insurance may be expressed in a few words, but the ordinary insurance policy is a formidable document; and when read, as it ought always to be, and occasionally is, it appears to be composed mostly of conditions. Each one of these is construed as a distinct warranty, and must be literally complied with. These conditions very often include the uses to which the property is to be put, and that it shall not be used for certain trades or for storing certain goods, whereby the risk is increased. In insuring buildings used as stores it is usually stipulated that such inflammable and explosive goods as kerosene, gasoline, benzine, gunpowder, etc., shall not be handled by artificial light. A failure to comply with such a condition, whereby damage is caused, will avoid the policy. But a condition prohibiting "storing and keeping hazardous articles" is not broken by a mere casual placing of such articles in the building. Nor is the keeping and using of such articles in the course of repairs upon the premises, a breach of the condition.

**Assignment of Policy or Property.**—Fire policies usually contain a provision which renders them void in case the policy or the property is assigned or transferred. This condition applies during the continuance of the risk. After the loss the claim is assignable. A complete transfer of the property itself without the policy deprives the insured of his insurable interest which destroys the contract, because the insurable interest in the insured is not only essential at the inception of the policy, but it must continue through its whole term.

The legal effect of a transfer of the property in avoiding the insurance may, however, be prevented by the consent of the insurer. It is quite customary where a person sells premises covered by an insurance

policy that would not expire for some considerable time, for him to agree with the purchaser to repay to him a proportionate part of the premium advanced, and continue the insurance. Then, instead of having his policy cancelled, and receiving the surrender value of it, as he must otherwise do, he goes to the agent of the company and has the policy transferred. This is always done by the company without objection.

Where the insured does not transfer the premises entirely, but only an interest in them, as where he gives a mortgage upon the property, and it is agreed that the buildings shall be insured for the benefit of the mortgagee, the insurer may have his policy transferred in such a manner that in case of loss the mortgagee will be first paid the amount of his claim, and the balance, if any, the company will pay to the insured himself.

**Reinsurance.**—The insurer has an interest in the preservation of the property, and may, therefore, reinsure it. In this way a company may, if it choose, entirely relieve itself of the risk, or may share it with another company. The party originally insured has no interest in the new policy. In case of loss the first company must pay the insured and collect from the other insurer.

**Loss.**—The damage for which the insurer is liable under a fire policy may result, as we have seen, not only from the actual burning, but from the use of water in extinguishing the flames. It may also be caused by the excessive heat of the fire; and the damage may even be the result of fire in adjoining premises. The insurer is not relieved from liability even if the loss occurs through the negligence of the insured. Most fires do, in fact, result from negligence, and against the possibility of this the insured seeks to be protected. But this is only the case where there is no fraud. If the insured burns, or attempts to burn, his buildings in order to secure the insurance, it would be an attempt to commit a fraud and would prevent his recovery. And in case of fire, he must do all within his power to save the property, or he will not be protected by his policy.

**Adjustment of Loss.**—Where the policy contains no valuation of the property insured, the actual value of the property at the time of the loss determines the insurer's liability. In such cases it is usual to have the loss appraised by disinterested parties, and the insurer is bound to pay the loss as thus estimated unless he can show that the estimate is not correct.

No increase or decrease of its value, caused by some unforeseen circumstance, can be taken into account; neither can any damage or inconvenience resulting to the insured or his business, by reason of being

deprived of the use of the building injured or destroyed. If, however, the parties have valued the property in the contract, then, as we have seen, this constitutes the basis for determining the loss. The insurance company usually sends an agent, called an adjuster, who, after the loss has been determined, pays the amount due.

### QUESTIONS.

Define fire insurance. What is an insurable interest in property? What is the contract called? What should it contain? What is stated regarding the premises? the risk? What effect has a change of risk? What is said regarding the amount insured? What is the effect of stating the amount in the policy? What is said regarding insurance in more than one company? How is the time for which insurance is to continue stated? What is said of the surrender of policy? Define premium. What is a representation? warranty? How do they differ? What conditions are sometimes placed in a policy? Give their effect. What is said of assignment of insured property? of the policy? What is said of reinsurance? Under what circumstances does the insured become liable? How is the loss adjusted?

## CHAPTER XXXV.

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### LIFE INSURANCE

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**Definitions.**—The contract of life insurance is an agreement to pay a specified sum of money upon the death of a certain person, or when he reaches a certain age. The parties to the contract are (1) the insurer, and (2) the person to whom the money is to be paid on the policy, called the beneficiary. Sometimes a person takes an insurance policy payable to himself, in which case if it be payable at the end of a definite period, and he be then living, the money is paid to him; but if he die before the expiration of the time, or if the policy be payable at his death, then the proceeds are paid to his personal representatives, and become a part of his estate. In most cases, however, the policy is made payable to some person other than the one insured, and in that case the creditors of the latter have no claim upon the proceeds, nor can he himself dispose of them by will, or otherwise.

**Insurable Interest.**—The application for life insurance usually states the fact that the person applying has an insurable interest in the life of the person sought to be insured. A person cannot have the life of another insured in whom he has no interest. A creditor may have the life of his debtor insured because he has an interest in it. A person has an insurable interest in the life of his partner, or one who is engaged in business with him. A wife has such an interest in the life of her husband, and a sister in the life of a brother, by whom she is educated and supported. A father has an insurable interest in the life of his minor child; and a woman engaged to be married, has such an interest in the life of her prospective husband. In general it may be said that one has an insurable interest in the life of a person, if by the death of that person he will naturally suffer a pecuniary loss or disadvantage. Unlike fire or marine insurance, this insurable interest in life insurance need not continue. It is sufficient if it exists at the inception of the policy.

**Fraud and Concealment.**—The insurer, in consideration of the payment of the specified premium, assumes a certain risk. Before an insurance company will insure a person's life, it desires to know that he possesses ordinarily good health, and in order to determine this and other

things which affect the risk, it is customary to ask the applicant for insurance a list of questions bearing upon the risk. The degree of risk the company assumes depends upon many circumstances, such as the occupation of the person insured, his physical condition, inherited tendency to disease and the like, and therefore, in order to estimate this degree of risk, the insurer is entitled to have the questions asked, honestly answered. Hence, if a fraudulent representation is made, regarding the matters inquired about which affects the insurer's risk, it will avoid the policy. If, however, all the questions put to the person applying for insurance have been truly and fully answered, an omission to state facts not called for is not fraudulent. An honest answer to all questions is sufficient.

**Conditions.**—Where conditions are inserted into the policy or contract, they must be strictly fulfilled. If it be provided that the policy shall become void in case an annual premium is not paid on the day specified, a failure to make such payment annuls the contract; and even the act of God preventing the payment will not serve to keep the policy in force. A man's occupation and place of residence affect his chance of life. Hence, where, as is sometimes the case, the policy contains a condition that the insured shall not reside in certain countries, or south of a specified parallel of latitude, or that he shall not engage in certain kinds of business, the policy is annulled by a failure to observe such condition.

The condition very generally inserted in life insurance policies making them void in case the insured shall die by his own hand, has caused a vast amount of litigation. It has generally been held that, in order to actually render the policy void under this condition, there must be a criminal act of suicide. But an act done by a person deprived of his reason is not his act, and therefore, where the suicide was an insane act of self-destruction, committed while the insured was in such a disordered state of mind as not to understand that his act would cause his death, or where the act was committed under some insane impulse that he could not resist, it has been held not to avoid the policy. Some of the life insurance companies have now made this condition in their policies operative only for a certain specified time, as two or three years, after which the suicide of the insured cannot be interposed as a defense to an action against the company to compel payment. Some companies insert no clause avoiding the policy in case of suicide. The general tendency of insurance companies has been to make conditions as few and as reasonable as possible in order to increase their business, so that some companies now insert in the policy a provision that it is to be without conditions after the expiration of two or three years.

**Assignment.**—All life insurance policies are assignable like any other chose in action, unless such assignment be forbidden by the statutes of the state. The insurance companies usually establish certain rules regulating the assignment of their policies. This is mainly for the purpose of keeping them informed as to the ownership of policies, and they often provide in the policy itself that it shall be void if it is assigned without the consent of the company. Persons who have had their own lives insured for the benefit of themselves, may assign the policies in payment of claims or as collateral security for their debts and obligations, and they are, in fact, very largely used for the latter purpose in business transactions.

**Accident Insurance** is a contract of indemnity against bodily injuries effected through external, violent, and accidental means within the intent and meaning of certain conditions annexed to such policy. The business of insuring against the result of accidental injuries has grown into great importance. Accident insurance is done by stock companies which issue regular policies for a specified time, upon payment of a fixed premium. It is also done to a very large extent by mutual companies, of which the insured becomes a member. He is then obliged to pay his premium in the form of assessments, sometimes varying in amount, at stated intervals, usually each month; and his policy is avoided and his protection ceases upon a failure to pay such assessments as are required by the terms of his agreement.

**The Indemnity** usually consists in the payment of a gross sum in case of death and of a weekly payment in case of disability from injury. The payment in case of death is restricted by a provision to the effect that it shall only be made in case the insured dies within a specified time, usually ninety days, after the injury. In mutual companies the gross sum to be paid in case of death depends upon the number of members then paying assessments, although it is ordinarily provided that the amount shall not exceed a sum named in the certificate. In other companies the exact sum is specified in the policy. In the case of a weekly indemnity the amount is stated in the certificate or policy, and it is provided that in no case shall the payment continue beyond a specified time, usually twenty-six weeks. Where a beneficiary becomes entitled to payment upon the death of the insured, all sums paid as weekly indemnity on account of disability resulting from the injuries, finally causing death, will be first deducted and only the balance paid. In accident policies, it is frequently provided that in case of a loss of two limbs or both eyes, or in case of total disability in any other way, the full amount of the policy will be paid.

**Injuries.**—Insurance against injury by accident includes all injuries

not excepted by the terms of the policy. But if the injury is attributable to the negligence of the insured it is not accidental, and the insurer is not bound; as where a passenger negligently puts his arm out of the window of a moving car and his hand is injured by a post standing near the track. However, the negligence of the insured will not avoid the policy unless there is an express provision in it to that effect.

**Proof of Death or Injury.**—Before an insurance company can be compelled to pay a policy, proof must be furnished of the death or injury of the person insured. In case of death, a certificate of the attending physician or an undertaker is sufficient. In case of injury, a certificate of a physician stating the time during which the person was disabled is usually required.

#### QUESTIONS.

Define life insurance. Who are the parties? What constitutes an insurable interest in life? Give example. What does an application for life insurance contain? What effect has fraud and concealment? What conditions are sometimes inserted in life insurance policies? Give their effect. What is said of the assignment of the policy? Define accident insurance. Of what does the indemnity usually consist? What injuries does it include? What is said of death or injury?

## CHAPTER XXXVI.

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### MARINE INSURANCE.

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**Definitions.**—Marine insurance, like fire insurance, is a contract by which the insurer agrees to indemnify the insured against certain perils to which his ship, freight, cargo and profits, or some of them, may be exposed during a certain voyage, or for a definite time. The parties are the same as in life or fire insurance, though the insurers are more generally called underwriters than in the other classes.

**Insurable Interest.**—As in the other classes of insurance, the insured must have an insurable interest in the property covered by his policy, or it will not be valid; and further than that, as in fire insurance, this interest must exist at the time of the loss. Any person having an actual interest in the property, or a lien upon it, may have it insured. The rule is that any person may be said to have such an interest who may suffer from the injury to which the property insured is exposed. A creditor who has loaned money on bottomry or respondentia bonds has an insurable interest in the ship or cargo. The interest which an insurer acquires by the risk taken gives him the right to reinsure the property. This is often done, as in fire insurance, where the insurer wishes to relieve himself from a portion of the responsibility, or he may do it as a matter of profit, which results in case he reinsures at a lower premium than he received from the owner.

**The Property Insured.**—As the definition implies, the ship, freight, cargo and profits may be insured. Where the insurance covers the body of the ship, it includes also, unless there be some agreement to the contrary, all that belongs to it, and is necessary and proper, in the course of its navigation. The freight which is insurable is the remuneration to be paid to the ship owner for the hire of his vessel. This is held to include the benefit an owner would derive from carrying his own goods in his own vessel. The property insured must be so described that it can be identified, and where this is done a mere mistake in the description will not affect the validity of the policy. The rule is that where the ship is specified, it becomes a part of the contract, and the cargo cannot be transferred to another vessel without avoiding the policy, unless it is done from necessity.

**The Risk.**—In marine insurance, the risk includes all extraordinary hazards of a sea voyage. The policy usually contains a considerable list of these perils, among the most important of which are perils of the sea, fire, piracy, theft, capture, arrest and detention, barratry, general average and salvage.

The expression, perils of the sea, is meant to include the risks of navigation, such as those resulting from storms, collisions, rocks, reefs, etc. The loss by fire includes, as in fire insurance, all damage resulting from the use of water and other means and appliances for extinguishing or staying the flames. Piracy and theft cover all losses by robbery or thieving. This does not generally include theft committed by persons who were lawfully on board the vessel. Capture, arrest and detention are usually combined into a single phrase, and refer to the acts done under authority of some government, as where the ship is captured by a man of war belonging to a hostile nation. Barratry is any breach of duty committed by the master of the vessel or the seamen, without the consent of the owner, by reason of which the ship or cargo is injured. Sailing out of port without paying port duties, and engaging in smuggling, are acts of barratry. General average and salvage have already been explained.

**Duration of the Risk.**—This depends strictly upon the agreement as expressed in the policy. It is sometimes a specified time, as a month or a year, or it may be for a particular voyage. Where the time is specified, the policy, as in fire insurance, states the exact day and hour when it begins and ends; and it is sometimes provided by a special clause that, in case the vessel should be upon the ocean when the date fixed for its expiration arrives, the insurance shall nevertheless continue until she reaches port.

When the insurance is for a particular voyage, such voyage must be accurately determined and described. This requires a statement of the time and place of the beginning and end of the voyage, and all intermediate ports at which the vessel may touch. In case the vessel unnecessarily deviates from a course thus prescribed, the insurer is discharged from liability for loss. Even touching at one port in place of another, both being equally in the way of the vessel, has been held such a deviation as to render the policy void. Where, however, the deviation is rendered *necessary* by stress of weather, need of repairs, or to avoid capture or detention, it will not discharge the insurer. A deviation from the course in order to save life is under a moral compulsion, and will not avoid the policy. A policy of insurance upon the cargo covers all risks until the goods are actually landed.

**The Amount Insured.**—This may be agreed upon in advance by

the parties to the insurance, who settle upon a valuation which is included in the policy. This makes what is known as a valued policy. The effect of such a valuation is to establish the basis upon which to calculate the proportion of any loss for which the insurer will be liable. That is, the insurer only pays the whole loss where the valuation is the same as the amount of the policy. But, if the goods be insured for a portion of their valuation, then the insurer must pay only that proportion of the loss represented by the ratio which the amount of the policy bears to the valuation. For example, if the cargo be valued at \$10,000 and insured for \$5,000, and the loss amounted to \$8,000, the insurer would be liable to pay \$4,000; and if the loss were \$2,000, he would pay \$1,000, that is, in any event he must pay one half of the loss. By insuring for half or any other fraction of its value, the owner is held to be himself the insurer of the remainder of the cargo. This is very different from the rule in case of valuation in fire insurance policies.

An open policy is one in which there is no valuation of the thing insured. Under such a policy the value of the cargo or ship in case of loss must be determined by evidence, and it must be the value at the time the insurance was effected.

**Assignment of the Property Insured.**—As we have seen, goods conveyed by a vessel may change ownership one or more times and be transferred by symbolic delivery before they are actually received. In order to permit this without the consent of the insurer, a certificate is sometimes issued by the company, which may be transferred from one owner to another with the title to the goods, without affecting the validity of the policy, and in case of loss payment will be made to the final holder of this certificate.

**Warranties.**—The stipulations on the part of the insured are termed warranties; and a warranty is considered either affirmative or promissory. It is affirmative when it describes the ship or cargo, and promissory when the insured undertakes to perform some act or thing, as that the ship shall sail by a given day, or be manned in a particular manner. Such warranties are called express, and, as in fire insurance, they must form a part of the policy. Such a warranty becomes a condition precedent, and must be performed, or there is no valid contract; and the performance must be strictly literal, no matter whether it be material or not.

There are also certain implied warranties, as that the ship shall be seaworthy when she sails, and that she shall be properly manned and navigated. These implied warranties embrace all that is essential to the general safety of the vessel. Any breach of these warranties of seaworthiness at the commencement of the voyage will discharge the insurer from responsibility for loss. It is only the extraordinary perils, as we

have seen, which are covered by insurance. The ordinary perils must be guarded against by the seaworthiness of the ship, and its proper navigation.

**Disclosure and Concealment.**—The insured is bound to disclose every fact within his knowledge which may affect the determination of the insurer to issue or refuse a policy, or his decision in fixing the amount of the premium. A failure to do this will avoid the policy. And the same result will follow the positive misrepresentation of any fact material to the risk. The concealment or suppression of a fact which is material and continues until the risk begins, discharges the insurer.

**Abandonment.**—This is a relinquishment to the insurer by the insured of all his interest in the portion of the thing insured, which has been saved. Of course there is no such thing as abandonment in case of total loss, and the right to abandon may only be exercised by the insured when the loss has exceeded one half of the subject-matter of the insurance. When the conditions give the insured the right of abandonment, he may exercise it or not as he chooses; but the insurer has not an equal liberty, for he cannot refuse to take the property, and thus be relieved from the payment of any part of the loss. Abandonment cannot be revoked by the insured after it has been accepted by the insurer. The object of abandonment is to enable the insured to collect the whole value of the property insured. Insurance is sometimes effected by agreement between the parties without right of abandonment, in which case a statement to that effect is embodied in the policy.

**Adjustment.**—The adjustment of marine insurance losses is rather a complicated matter involving as it does general average, salvage and various other allowances. It is generally done by persons who make it a business or profession. Ordinarily the loss is adjusted at the first port of discharge reached after it occurs.

**Return of Premium.**—The insured may dissolve the contract before any risk has been incurred by electing not to ship the goods, or not to commence the voyage. In this case he may have the premium returned to him. He may also have it returned, provided there has been no fraud on his part, where the contract of insurance proves to have been void from the beginning, as from the failure of a warranty.

### QUESTIONS.

What is marine insurance? What are the parties called? What interest must the insured have in the thing insured? What is said of reinsuring? What property may be insured? Where the insurance

covers the body of the ship, what does it include? What is the freight which is insurable? How must the property insured be described? Upon what ground may the cargo be shifted from the vessel specified in the policy? What does the risk include in marine insurance? Name some of the perils mentioned in the policy? What is meant by perils of the sea? What does the loss by fire include? What does the indemnity against piracy and theft cover? What is meant by capture, arrest and detention? What is the meaning of barratry? Define general average and salvage. For what time are policies made? When is an accurate description of the voyage necessary? What does such a description require? What is the effect of deviation from a prescribed course? What is a valued policy? What is the effect of such a valuation? How does the rule of partial insurance in a marine policy differ from that in a fire policy? What is an open policy? What are warranties and how are they divided? When is a warranty affirmative and when promissory? What are some of the implied warranties in marine insurance? What is the effect of a breach of any of these warranties? What perils are covered by insurance? What is abandonment? When may the right of abandonment be exercised? What is the object of abandonment? By whom is the adjustment of marine losses generally effected? Where are such losses ordinarily adjusted?

## CHAPTER XXXVII.

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### PATENTS, TRADE-MARKS AND COPY-RIGHTS.

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**Patents.**—The Constitution of the United States confers on Congress power to grant to inventors the exclusive right to manufacture and sell their inventions for a limited time. Congress has carried out this provision of the Constitution by establishing a patent office, under the direction of a commissioner of patents, and has made rules under which patents can be obtained. To obtain a patent an application is filed with the commissioner, setting forth in detail a description of the invention and what it is to do. This description is very technical and requires a patent attorney to prepare it. Fifteen dollars must be deposited with the application to pay for the trouble of looking through the records to see whether the article is patentable, and when the patent is granted twenty dollars more must be paid. This first fifteen dollars is not refunded though the patent be refused.

**Who May Obtain a Patent.**—Any one who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, may obtain a patent therefor. The patentee must be the first as well as an original inventor or discoverer, to be entitled to a patent. To obtain a patent, a person need not be a citizen of this country, foreigners being entitled to the protection of the patent laws equally with citizens.

**Assignment.**—A patent is property which may be bought and sold like other property. The rights of a purchaser depend upon the terms of the agreement under which the patent is assigned. The right to make and sell the article within a certain territory may be sold, and in that case the purchaser has all the rights of the patentee within that territory, but has no right outside of it.

The sale may also be of the full right to the patent, in which case the purchaser succeeds to all the rights of the patentee.

**Infringement.**—The patent laws give the patentee the exclusive right to make, use, and vend the patented article; it is therefore an infringement to make or use or sell that article, and the patentee has

an adequate remedy for any violation of his rights. In case of infringement in any of these ways the patentee can bring an action for damages against the party so infringing in a United States court, and the court is authorized to award damages in any amount not exceeding three times the actual damage sustained. What are the actual damages sustained must, of course, be determined by the jury in view of all the facts.

**Trade-Marks.**—A trade-mark is any name or device used by a seller in connection with goods sold by him, in order to secure to himself profits arising from the peculiar character of the goods bearing that mark. The mark may be a device or symbol which is meaningless in itself, or it may be a descriptive word, or a combination of the two. The mere name of a person without any mark to distinguish it from the same name possessed by others cannot be protected as a trade-mark.

**How Acquired.**—The statute which regulates the granting of patents also provides for the protection of trade marks. In order to secure protection of a trade mark it must be recorded in the patent office in accordance with the provisions of the statute. The fee for recording is twenty-five dollars. After a trade-mark is properly recorded its owner is protected in its use for a period of thirty years, and if application is made six months prior to its expiration and the usual fee paid it may be renewed for another thirty years. A trade-mark, when properly registered, becomes property, and is subject to transfer like any other property. It may be sold or bequeathed by the owner, and if he dies without having thus disposed of it, it passes by inheritance to his heirs.

**Infringement.**—Any imitation of a trade mark sufficiently close to be likely to deceive a person into the belief that he is buying the trade-marked article when he is not, will constitute an infringement, and will subject the infringer to the payment of whatever damages may be occasioned by such infringement. In order to be a violation of a trade-mark it is not necessary that the imitation be an exact copy; if sufficiently like it to deceive a merely casual observer it is an infringement.

**Copyright.**—A copyright is the exclusive right which the law secures to a person to publish and sell the product of his brain; like a writing, drawing, or an engraving, musical composition, sculpture, or anything else of like nature. The law allows the granting of copyrights to any resident of the United States, and according to a recent statute also to residents of foreign countries, if the country in which they reside allows similar privileges to residents of the United States. Copyrights are granted for a period of twenty-eight years, and may be renewed for a period of fourteen years.

**How Obtained.**—The librarian of Congress is made by law the register of copyrights. To obtain a copyright the author or designer must

deliver to the Librarian of Congress a printed copy of the title page, if it be a printed composition, or a photograph, if it be a painting, drawing or sculpture, together with fifty cents to pay for recording, and fifty cents additional if he desires a certified copy of the copyright entry. If the copyrighted article be a book, the proprietor must also mail to the Librarian of Congress two copies of the same in the best binding in which it is issued, not later than date of publication. A failure to do this subjects the offender to a penalty of twenty-five dollars and renders the copyright void. A copyright, being property, may be transferred by sale, by inheritance or by bequest, like any other property, and the person into whose hands it comes is entitled to all the rights of the original holder.

**Infringement.**—Just what constitutes an infringement of a copyright is a question that has been very much discussed and which has never been very definitely settled. The remedy in case of infringement is generally damages for the injury caused and an injunction ordering the infringer to cease violating the copyright in the future.

#### QUESTIONS.

Define patent. How is it obtained? Who may obtain a patent? For what may it be obtained? What is said of the assignment of patents? What rights has an assignee? What is the remedy in case of infringement? Define trade-mark. What is its purpose? How is it acquired? What is said of infringement? What is a copyright? To whom is it granted, and for what? How is it obtained? What is said of infringement?

## CHAPTER XXXVIII.

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### REAL PROPERTY.

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**Definitions and Explanations.**—Real property, or real estate, as it is often called, has been already defined. From that definition it is apparent that real property includes all minerals, oil, and water below the surface, as well as everything that is upon and affixed to it, and all these pass with the transfer of title from owner to owner. So strict is this rule, which includes in real property everything of a permanent nature attached to the soil, that if a person erects a building on the property of another, or affixes to the soil, or builds into another building any other structure, it will usually belong to the owner of the land, and can be removed only with his consent.

Appurtenances is a word frequently used in connection with real property, and means something belonging to the particular premises described, as the keys of a house, fences, a windmill, or gates.

**Rights to Real Property.**—In England the title to all real property is supposed to have been originally in the king, who granted much of it in parcels to his subjects. But these grants were not absolute; they were made upon condition that the holders should always stand ready to render the king their services in time of war, both personally and by providing men and supplies for his armies. These powerful subjects subdivided their estates, and allotted the land to large numbers of smaller proprietors who then became their *vassals*, upon substantially the same condition of service as that under which they themselves held. This interest of a vassal was called a feud, and hence the system which grew out of the practice of such allotments was known as the feudal system. Feud was also called fief, and from this came the word fee. In England when a feud, fief or fee was granted to an individual unconditionally, it was termed a simple fee, or a fee simple, that is, it was a conveyance without restrictions; and the words are used in substantially the same sense at the present time, both there and in this country. The same principle is applied in this country, and it is held that all individual titles to land have been derived since the Revolution from the government of a state or of the United States. The title thus

derived is absolute, except that in all cases the right of eminent domain is reserved to the Government or the State. This is the right to take individual property from the owners for public uses upon paying them, or causing them to be paid, a just compensation.

**Kinds of Rights.**—The right or interest which a person has in real property, is called an estate, as an estate in fee simple, an estate for life, or an estate in reversion. These rights, or estates, are numerous, and some of them very difficult of comprehension. Only a few of the more important ones will be here considered.

**Estate in Fee Simple.**—This, as we have seen, is equivalent to full ownership of the property. The owner, therefore, possesses it absolutely, subject only to the right of eminent domain. As it is sometimes said, he owns downward to the center of the earth and everything upon the surface. No one may come upon it without his consent, and he may use all necessary force in removing and keeping off a trespasser. He may use the property as he chooses, provided he does not thereby cause injury to others or to their property. He may sell or give it away, and in case he does not dispose of it during his life, or by will at his death, then upon his decease the title passes at once, by operation of law, to his heirs, who take it in fee simple as he owned it. But if he has no heirs, the property escheats, that is, it falls back to the original owner, viz., the State.

**Estate for Life.**—The owner of an estate in fee simple, being at liberty to do what he chooses with it, may, as it is sometimes said, carve out of it other and lesser estates. For example, A owning an estate in fee simple, may transfer it to B to be held by him during his life, or during the life of any third person, in which case B has what is termed an estate for life. The owner of such an estate has a right to the full enjoyment and use of the land, and all the profits arising from it. But he has no right to destroy or waste the property by cutting down timber, unnecessarily destroying buildings or fences, or otherwise doing anything not necessary to his enjoyment of the premises, and which inflicts a permanent injury upon them. His interest being only for life, the owner of the remainder of the estate is entitled to be protected from such waste, and the law will interfere to prevent it.

The life owner cannot, of course, sell or mortgage the property itself, but he may encumber or dispose of his estate in it. The purchaser of his interest would take the same right to the use and occupancy of the premises which the life owner himself had, and be subject to the same restrictions in regard to injury and waste. The owner of the life estate must pay all ordinary taxes, and a just proportion of such necessary expenditures as are for the permanent benefit of the property.

**Estate in Reversion.**—Where the owner of an estate in fee simple disposes of a life interest in it, he parts with only a portion of his estate. He still has remaining an interest in the property, and after the expiration of the life estate the premises will return, or revert to him, or to those who succeed to his interest; and therefore his remaining interest is known as an estate in reversion. This may be transferred in the same manner as the entire estate. In the last illustration B has an estate for life, while A retains an estate in reversion, which he may transfer by deed or will, and whoever holds it will take the property in fee simple upon the termination of the life estate.

**Dower.**—The owner of real property, if he be a married man, cannot convey it and give a perfect title unless his wife joins in the conveyance. This is because a wife has a right of dower in all the real property owned by her husband. This gives her no present right to the property in any way. The husband may sell it, and the grantee take possession notwithstanding any objection the wife can make. Her right of dower is therefore said to be inchoate, that is, incomplete. But if she survive her husband, the moment he dies, her right of dower is complete and she may claim the actual possession of her part of the property or receive the income thereof. And this claim usually extends not only to all the real estate of which the husband dies the owner, but also to all he may have sold at any time during the existence of the marriage relation between them, in the conveyance of which she did not bar her dower, by uniting in the deed or executing a separate relinquishment. In a few states the widow is only entitled to dower in the land which her husband owned at the time of his death, and hence it is not necessary for her to join in the husband's conveyance of real property. In some states, a married woman holding real estate in her own right may convey the same absolutely without the knowledge or consent of her husband.

In most states the widow's right of dower consists of the use, during her life, of a certain part of her husband's real property. This is usually one-third, but in some states a half or other fraction. In such cases it furnishes an illustration of an estate for life. In a few states the statutes give to the widow for her dower, not a life estate, but the fee simple of her portion of the property. In case of a refusal of the heirs to set apart the widow's interest, she may compel such division by an action for the admeasurement of dower.

Under the common law the husband had a somewhat similar right in the real property owned by his deceased wife, in case a living child had been born to them. This right was known as an estate by the curtesy. It is yet recognized by the laws of many of the states in that form, while it has been modified or abolished in others.

**Other Estates.**—Property is sometimes given to one person for the benefit of another. It then constitutes a trust estate in the person to whom it is thus given, who is called a trustee, and who must care for and manage the property, or pay to or use the proceeds for the benefit of such other person, who is sometimes called the beneficiary. There are statutes in most states prohibiting the creation of trust estates for more than a specified time.

Estates are distinguished also with regard to the number of owners. An estate in severalty is one that is owned by one person. Those most frequently met with which are held by several owners, are estates in joint tenancy, and estates in common. The principal distinction between these is in the fact that in joint tenancy where one party dies the others succeed to the full ownership of the property, whereas in tenancy in common they do not. The former is not favored by the law and will not be presumed. In several states, there are statutes providing that unless it be explicitly provided in the conveyance that the parties shall take as joint tenants, any two or more owners of real property shall hold it as tenants in common. Any one of several persons thus owning property may, in case a division cannot be agreed upon, bring an action for partition, and have his interest secured to him in severalty.

**Highways.**—The owner of farm lands almost universally owns to the middle of all public highways bounding his property. The public has a right to use all his property within the limits of the roadway for the purposes of travel, and the owner may not in any way interfere with the exercise of such right. He may, however, cut and remove the grass growing along the highway upon his land, or use it in any other way which does not abridge the rights of the public; and if the highways should be abandoned, he may resume full control of his property.

**Streams.**—A person is entitled to make reasonable use of a stream of water flowing through his land, but the exception already noted that an owner cannot use his own property in such a manner as to injure others or their property applies with great force to running water. The owner may make all ordinary use of it. He may even change the course of the stream upon his own land, but it must be returned to its usual channel when it enters the property of the adjoining owner. And he must not contaminate the water or throw into it any waste material, as saw dust, from a mill, to be carried beyond his premises and deposited to the detriment of other owners. If land be bounded by navigable waters, the owner's title usually extends to high water mark. But if his boundary be a stream not navigable, the line between his own property and that of adjoining owners is the middle of the stream.

**Easements.**—It often happens that the owner of real property possesses certain privileges in neighboring lands, that is, rights which he

may exercise over the property of others. These privileges are known as easements, and are appurtenances of the real property belonging to such owner, and pass with it to his grantee. The right of way which one man has over his neighbor's land to enable him to reach a highway, or some other part of his own premises, or to procure water from a spring, or even to cut and carry away wood, is each an easement. In cities where land is very valuable, adjoining owners often unite in erecting a wall on their dividing line, one half of it being on the property of each. This is called a party-wall, and supports the buildings on both sides of it. Each owns his own half and has an easement in the other half, that is, a right to have it remain as a support to his building.

Easements are created by special grant, or are acquired by long usage, that is, by an exercise of the privileges for a number of years, the length of time varying in different states. They continue until they are actually surrendered, or are lost by a failure to use them, which amounts to a surrender.

#### QUESTIONS.

What is real property? What does the term include? What are appurtenances? What is meant by a fee simple? How is this principal of original ownership applied in this country? What is the right of eminent domain? What is an estate? What are some of the rights of the owner of an estate in fee simple? What exception is there to his rights to use his property as he chooses? What becomes of his property in case of his death without having disposed of it? What becomes of it in case he has no heirs? Illustrate what is meant by a life estate? How may the owner of a life estate use the property? How is he restricted in its use? What is an estate in reversion? How may this be transferred? Define dower? Why is the wife's dower interest called inchoate? To what does this claim of dower usually extend? How does the wife bar her dower? In what does the widow's dower right usually consist? What may her estate be said to be in such cases? What is an estate by the curtesy? What is a trust estate? What are the parties called? How is an estate designated which is owned by one person? Name two estates in which there are two or more owners. Distinguish between them. How far does the title of the owner of farm lands include adjoining highways? What right has the public in such highways? What use may the owner make of his land in the highways? What use may a person make of a stream flowing through his land? What are easements? Give illustration. What is a party-wall? What rights have the adjoining owners in it? How are easements created? How long do they continue?

## CHAPTER XXXIX.

### REAL ESTATE CONVEYANCES.

#### DEEDS.

**Definitions and Explanations.**—Real estate conveyances include all instruments by which the title to real property is transferred from one person to another. They must always be in writing, but this requirement is fulfilled where the instrument is printed. As a matter of fact, nearly all such conveyances are now made by filling in printed forms, and are therefore partly written and partly printed. Real estate conveyances are of two kinds, deeds and mortgages.

**Deeds.**—A deed is an executed contract. It does not promise to do something; it does it, that is, it conveys the property. The parties must be competent to contract. The one who conveys the property is called the grantor, and the one to whom it is conveyed, the grantee. Deeds are now much simpler documents than formerly, although in many states they retain at the present time considerable of the old phraseology. In other states, short forms have been adopted and declared by statute sufficient to convey complete title. The forms here given are those in use in the state of New York, except the acknowledgment, and they would probably be sufficient in any state. Deeds are of two general kinds, warranty and quit claim. Of warranty deeds there are those with full covenant and the simple warranty.

**Warranty Deed, Full Covenant.**—The warranty deed is a conveyance in which the grantor warrants the title to the property and agrees to be responsible for any defect in his title. The following is a form of warranty deed called full covenant:

#### FULL COVENANT WARRANTY DEED.

*This Indenture, Made this tenth day of January, in the year of our Lord one thousand eight hundred and ninety-two, between Andrew D. Whitney and Emma, his wife, both of Ithaca, Tompkins County, New York, of the first part, and Oliver D. Reed, of Geneva, Ontario County, New York, of the second part,*

*Witnesseth, That the said parties of the first part, in consideration of the sum of five thousand dollars (\$5,000) to them duly paid, have sold, and by these presents do grant and convey to the said party of the second part, his heirs and assigns, all that tract or parcel of land situate in the town of Lansing, Tompkins County, New York, being a part of lot number forty-nine (49) in said town, and bounded and described as follows, to wit: Beginning at the southeast corner of land owned by John T. Reynolds, and running thence north one hundred and twenty-six and one-half ( $126\frac{1}{2}$ ) rods; thence east to the east line of said lot number forty-nine (49); thence south to land owned by Chauncey R. Brown; thence west to the northwest corner of land owned by said Brown; thence south to the center of the highway; and thence west to the place of beginning, containing one hundred and three acres of land, more or less, with the appurtenances, and all the estate, title and interest therein of the said party of the first part. † And the said Andrew D. Whitney does hereby covenant and agree to and with the said party of the second part, his heirs and assigns, \* that at the time of the ensealing and delivery of these presents, he is the lawful owner and is well seized of the premises above conveyed, free and clear from all incumbrances,\* and that he will forever warrant and defend the premises thus conveyed in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against any person whomsoever lawfully claiming the same or any part thereof.†*

*In witness whereof, The parties of the first part have hereunto set their hands and seals the day and year first above written.*

ANDREW D. WHITNEY. [SEAL.]

EMMA WHITNEY. [SEAL.]

*Sealed and delivered in presence of*  
J. E. KLINE.

State of New York, }  
COUNTY OF TOMPKINS, } ss.

*On this tenth day of January, in the year one thousand eight hundred and ninety-two, before me, the subscriber, personally appeared Andrew D. Whitney and Emma Whitney, his wife, to me known to be the same persons described in and who executed the within instrument, and severally acknowledged that they executed the same; and the said Emma Whitney on a private examination by me, apart from her said husband, acknowledged that she executed the same freely, and without any fear or compulsion of her said husband.*

{ SEAL. }

B. N. SHERMAN,  
Notary Public.

**The Distinctive Feature** of the foregoing deed is that part of it included between the asterisks, and which gives it the name of full covenant. These covenants are not essential to the validity of the conveyance, but being included in it they become very important. The covenant that "he is the lawful owner and well seized of the premises" means that the grantor has a good title and the very estate he professes to convey. It is known as the covenant of seizin, and if he has not such title, the covenant is broken the moment the deed is delivered, and the grantee has an immediate right of action against him for damages. The same is true of the other covenant against incumbrances. An unpaid tax, a private right of way, or an undischarged mortgage, would constitute a breach of it and make the grantor liable.

**Simple Warranty Deed.**—Leave out of the last form that part included between the asterisks, that is, the covenants of seizin and against incumbrances, and there remains the ordinary warranty deed. Unlike the covenants considered in the last section, this covenant of warranty is only broken by an actual eviction of the grantee, that is, by his being removed from the premises and the possession taken from him by process of law. The warranty simply says that the grantor will warrant and defend the property in the possession of the grantee, and it consequently is not broken until the grantee is no longer allowed the possession. Until then, he has no right of action against the grantor.

If, from the foregoing form, there be excluded all that part between the daggers, it would still be a deed and would convey the title to the premises, but containing no covenants or warranty, the grantee would have no right of action for the recovery of damages from the grantor, in case the title should prove defective.

**Quit-Claim Deed.**—The following is the ordinary form of quit-claim deed:

#### QUIT-CLAIM DEED.

*This Indenture, Made this seventeenth day of January, in the year of our Lord one thousand eight hundred and ninety-two, between Charles H. Williams (unmarried), of the city of Buffalo, County of Erie and State of New York, of the first part, and Andrew Barron, of the same place, of the second part.*

*Witnesseth, That the said party of the first part, in consideration of the sum of eight hundred dollars (\$800) to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has \* bargained, sold, remised and quit-claimed, and by these presents does bargain, sell, remise and quit-claim \* unto the said party of the second part and to his heirs and assigns forever, all that tract or parcel*

*of land situate in the City of Rochester, County of Monroe and State of New York, and more particularly distinguished as lot number twenty (20), as laid down on a map of Snyder & Stone's subdivision of a part of the Strong Tract on file in Monroe County Clerk's office in liber 5 of maps at page 83. Said lot number twenty (20) is situate on the east side of Kenmore street, and is thirty-three (33) feet in width, front and rear, and one hundred and fifty-nine (159) feet deep. Together with all and singular the hereditaments and appurtenances thereto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever, of the said party of the first part, either in law or equity, of, in and to the above bargained premises, with the said hereditaments and appurtenances, to have and to hold the said premises to the said party of the second part, his heirs and assigns, to the sole and only proper benefit and behoof of the said party of the second part, his heirs and assigns forever.*

*In witness whereof, The party of the first part has hereunto set his hand and seal the day and year first above written.*

CHARLES H. WILLIAMS. [SEAL.]

*Signed and delivered in presence of*

GEORGE F. STONE.

**This Deed is Distinguished** from the full covenant deed by having no covenants, and by containing different words of transfer. These are, in the quit-claim deed, the words included between the asterisks, and a reference to the corresponding words in the form of full covenant deed will give the distinction. The quit-claim deed conveys the grantor's title, if he have any, but it does not even amount to a representation that he has such title. It is the form of deed used by heirs or other tenants in common who divide their real property, and as it is said, "quit-claim to each other." That is, if A, B and C own property which they wish to divide, A and B quit-claim to C the portion set apart to him, describing it in the deed; A and C in like manner quit-claim to B; and B and C to A.

This form of deed is also used where the grantor is in doubt as to the validity of his title, but whatever it may be, wishes to convey it. It is also used generally in the relinquishment of apparent interests in land, in the surrender of easements, and in general where the grantor has no actual interest in making the conveyance, but does it for the benefit of the grantee to enable him to perfect or transfer his title.

**Covenant against Grantor.**—It often happens that, although the grantor will not give a full covenant or simple warranty deed, yet he is perfectly willing to covenant that he has not himself done or permitted

anything to be done injuriously affecting the title, and in that case, if the grantee desires it, there is inserted in the deed what is known as the covenant against grantor, which is as follows:

#### COVENANT AGAINST GRANTOR.

*And the said [grantor's name], for himself, his heirs, executors and administrators, does covenant, promise and agree to and with the said party of the second part, his heirs and assigns, that he has not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, whereby or by any means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be, impeached, charged or encumbered in any manner or way whatever.*

This covenant, when used in a quit-claim deed, is inserted just before the last clause beginning "In witness whereof." It may also be used in a warranty deed, thus making what is called a special warranty deed. It would then take the place of all the covenants included between the daggers, in the warranty deed given above. which would otherwise remain the same.

**Execution.**—A deed is a contract by specialty, and the consideration need not, therefore, be stated, though it is better that it be always expressed. The names of both parties should be given in full and their respective places of residence stated. Since it is usually necessary that a man's wife also sign the conveyance, if the grantor is unmarried that fact should be stated. A deed is usually signed only by the grantor or grantors. But by accepting it the grantee becomes a party to it, and is bound by its provisions, as for example, a provision that he shall assume and pay a mortgage covering the premises. The grantor need not, however, sign the deed personally. He may do it by attorney, that is, he may appoint some person by power of attorney who may sign the deed for him. Although a deed is said to be a sealed instrument, there are only a few states in which an actual seal of wax or paper is required.<sup>1</sup> In most states a mere scroll made with a pen is sufficient,<sup>2</sup> and in others seals are not necessary.<sup>3</sup>

<sup>1</sup> In the following states a seal is required and a scroll made with a pen is not sufficient: New York, New Jersey, Rhode Island and Vermont.

<sup>2</sup> In the following states a scroll made with a pen is sufficient to constitute a seal: Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Maryland, Michigan, Minnesota, Missouri, Maine, Nevada, New Mexico, North Carolina, Oregon, Pennsylvania, South Carolina, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming and District of Columbia.

<sup>3</sup> In the following states no seal at all is required: Arkansas, California, North Dakota, South Dakota, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Ohio, Nebraska, Tennessee, and Texas.

**Acknowledgment.**—This is simply a statement made to a proper officer by the parties whose names are signed to the deed, and written by the officer on the deed, that they voluntarily signed the instrument. A deed is binding upon the person who signs it without an acknowledgment, but it cannot be recorded unless it has been properly acknowledged, except that in some states the affidavit of a subscribing witness to the genuineness of the grantor's signature will take the place of an acknowledgment. In some states when a husband and wife execute a deed, the law requires that the officer shall take the acknowledgment of the wife separate and apart from her husband. The instrument may be acknowledged on the day of the date or at any time thereafter. An acknowledgment may be taken by a notary public, justice of the peace, or by any officer authorized to administer oaths.

**Delivery.**—But the deed may be properly drawn and executed, and yet it has no force whatever. One thing is wanting to make it effective. This is *delivery*, and by it is meant the actual handing over of the deed to the grantee or some other person authorized by him to accept it. The deed may be delivered immediately after its execution, or it may be held for months or years, but the moment the delivery is made the transfer is completed. A deed is sometimes delivered conditionally to a third party, who is to hold it until the happening of some event, when he is to hand it over to the grantee. In that case it is said to be delivered in escrow.

**Recording.**—After a deed has been executed and delivered, the person receiving it ought always to have it recorded or registered immediately. In every organized county there is provided at the county seat an office or building in which public records are preserved. Among officers there is an officer whose duty it is to receive and record in books furnished for that purpose, all conveyances of real property situated within the county, and instruments affecting the title thereof. The officer who has charge of this duty is usually called a Register of Deeds or Recorder. Sometimes it is made a part of the duty of the county clerk. Recording a deed or other instrument consists in writing it out in full in the record books, the originals being returned to the owner when called for. The law prescribes the fees for registry. An instrument is considered in law as registered or recorded when it is handed to the recording officer for that purpose. The exact time even to the minute of its receipt is therefore always entered upon the instrument by such officer, and that entry determines the date of record.

**Effect of Recording.**—The validity of an instrument is not increased by record. A deed conveys the title just as well before as after registry. And as between the grantee and the grantor or his heirs, or

third parties having knowledge of the conveyance, there is no necessity of recording the instrument, except to preserve the evidence of title in case of the loss or destruction of the deed. But as to third parties having no knowledge of the transfer, the recording of the instrument is absolutely necessary in order to protect the grantee's title. For example, suppose A sells and conveys his farm to B, who neglects to record his deed. Afterwards A sells the same property to C, who has knowledge of the transfer to B; C cannot hold it, notwithstanding the fact that he may have paid A full value for the property. But on the other hand, if C had purchased the property, paying value for it, without knowledge of the former conveyance, he would hold the property as against B, and be protected in his possession and ownership. The laws providing for the registering or recording of such instruments are known as registry laws, and are designed to give public notice of the condition of the titles to real property.

**Land Contract.**—Real property is often sold under a *land contract*, which must always be in writing. This method is adopted when the purchaser can only make a small payment at the time, when the owner requires time to perfect his title, or when there is some other reason for delay in delivering the deed. The contract is therefore an agreement upon sufficient consideration, on the part of the owner, to sell or on the part of the purchaser to buy the particular premises, which are to be conveyed at some specified future date, or when the purchase price or some particular part of it shall have been paid. In the last case it also contains an agreement on the part of the purchaser to execute and deliver to the seller at the time of completing the conveyance, a bond and mortgage, or a note and mortgage, to secure the payment of the balance of such purchase price.

#### QUESTIONS.

What are real estate conveyances? What kinds are there? Define deed. What are the parties called? What kinds of deeds are there? Define warranty deed; full covenant warranty; simple warranty. Define quit-claim deed. How is it used? What is meant by covenant against grantor? How is a deed executed? What is acknowledgment? What is said of delivery? What is recording? object? effect? What is said of its necessity? What is a land contract? Give its use.

## CHAPTER XL.

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### REAL ESTATE CONVEYANCES.

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#### MORTGAGES.

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**Mortgages.**—A mortgage is the grant or conveyance of an estate or property to a creditor for the security of a debt, upon payment of which it is to become void. It has the same effect as a pledge of the property for the payment of the debt, and it is called a mortgage, whether the property conveyed be personal or real. The person who gives the mortgage—the debtor—is called the mortgageor, and the one to whom it is given—the creditor—is known as the mortgagee.

A mortgage of real estate is substantially the same in form as a deed, with the addition of a statement of the amount secured, and the time and manner of its payment; also, an authority to sell in case of default in such payment; and a clause making the instrument void in case payment shall be made as specified. This last is called the defeasance clause. The following is an ordinary form of real estate mortgage and is supposed to be executed by the grantee to the grantor, to secure the payment of a part of the purchase price of the premises. The mortgageor's wife need not join in a purchase money mortgage, but must in all others the same as in a deed and for the same reason.

#### MORTGAGE.

*This Indenture, made this tenth day of January, in the year of our Lord one thousand eight hundred and ninety-two, between Oliver D. Reed, of Geneva, Ontario County, New York, of the first part, and Andrew D. Whitney, of Ithaca, Tompkins County, New York, of the second part, Witnesseth, that the said party of the first part, in consideration of the sum of three thousand dollars, being a part of the purchase price of the premises hereinafter described, has sold, and by these presents does grant and convey to the said party of the second part, his heirs and assigns, all that tract or parcel of land situate in the Town of Lansing, Tompkins County, New York, being a part of lot number forty-nine (49) in said*

town, and bounded and described as follows, to wit: Beginning at the Southeast corner of land owned by John T. Reynolds, and running thence North one hundred and twenty-six and one-half rods ( $126\frac{1}{2}$ ); thence East to the East line of said lot number forty-nine (49); thence South to land owned by Chauncy R. Brown; thence West to the Northwest corner of land owned by said Brown; thence south to the center of the highway; and thence West to the place of beginning, containing one hundred and three acres of land, more or less.

This Grant is intended as a security for the payment of the sum of three thousand dollars, to be paid in three equal annual payments of one thousand dollars each, with annual interest at the rate of five per cent. on all sums at any time remaining unpaid, according to the conditions of a bond this day executed and delivered by the said Oliver D. Reed to the said party of the second part. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, [(in case clauses in Sec. 12 are used add) or of the taxes, assessments or insurance hereinafter mentioned], it shall be lawful for the party of the second part, his executors, administrators, or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of all moneys arising from such sale, to retain the amount then due for principal, interest [taxes, assessments or insurance], together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said Oliver D. Reed, his heirs and assigns.

\* \* \* \* \*

And this conveyance shall be void if full payment of the aforesaid moneys, both principal and interest, be made as hereinbefore specified, and if the aforesaid covenants and each of them be well and truly kept and performed as hereinbefore specified and provided.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

OLIVER D. REED. [SEAL.]

State of New York, }  
ONTARIO COUNTY, } ss.

On this tenth day of January, in the year one thousand eight hundred and ninety-two, before me, the subscriber, personally appeared Oliver D. Reed, to me known to be the same person described in and who executed the within instrument, and acknowledged that he executed the same.

{  
SEAL.  
}

B. N. SHERMAN,  
Notary Public.

**Additional Clauses.**—There are three other clauses, one or more of which are now very frequently included in a mortgage of real estate, by way of additional security to the mortgagee. They are inserted immediately before the defeasance clause, and in place of the asterisks in the last form.

(1.) *And it is Hereby Expressly Agreed, that in case any installment of principal, or any part thereof, or any interest moneys, or any part thereof, hereby secured to be paid, or any money paid for taxes, assessments, or insurance, as herein specified, shall remain due and unpaid by said party of the first part, his heirs, grantees or assigns, for the space of sixty days after the same shall by the terms hereof become due and payable, that then and in that case, the whole principal sum hereby secured to be paid, together with all arrearage of interest thereon, shall, at the option of said party of the second part, his executors, administrators or assigns, become due and payable forthwith, anything herein contained to the contrary notwithstanding.*

(2.) *And it is also Agreed by and between the parties to these presents, that the said party of the first part, his heirs, grantees or assigns, shall and will keep the buildings erected and to be erected upon the lands above conveyed insured in some solvent incorporated Fire Insurance Company, against Loss or Damage by Fire, in an amount not less than three thousand dollars, the insurers to be chosen or approved by the party of the second part, his heirs, executors, administrators or assigns, and assign the policy and certificate thereof to the said party of the second part, his heirs, executors, administrators or assigns. And in default thereof it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to effect such insurance, as mortgagee or otherwise, and the premium or premiums paid for effecting and continuing the same shall be a lien on the said mortgaged premises, added to the amount secured by these presents, and forthwith be due and payable without demand, with interest from the time of such payment, and shall be collectible in the same manner, and upon the same conditions as the interest hereinbefore mentioned.*

(3.) *And it is Hereby Expressly Agreed, by and between the parties to these presents, that the said party of the first part, his heirs or assigns, will pay and discharge all taxes and assessments that now are or shall hereafter be levied or assessed upon the said above described premises or any part thereof, when the same become due and payable, and in default thereof, for sixty days after the same shall be so levied or assessed, and become payable, the said party of the second part, his heirs, executors, administrators or assigns, may pay such taxes and assessments, and expenses of*

*the same, and the amount so paid, and the interest thereon, from the time of such payment, shall forthwith be due and payable without demand from the said party of the first part, his heirs or assigns, to the said second party hereto, his heirs, representatives or assigns, by virtue hereof, and the same shall be deemed a part of the principal sum and secured by these presents, and shall be collectible in the same manner and on the same conditions as the interest on the principal sum hereinbefore specified.*

**Explanation of Clauses.**—The first of these clauses is known as the interest clause. Its effect is that in case the mortgageor does not make every payment within a certain specified time, which the parties may agree upon—usually sixty days—then the entire amount of the debt shall become at once due, and the mortgagee may enforce payment thereof. With this clause inserted, if Reed should not pay his interest or the first payment of one thousand dollars on or before March 9th, 1893, then the whole sum of three thousand dollars would be due at once.

The second is known as the insurance clause. It is usually made to cover the amount of the mortgage if the value of the buildings equals or exceeds that sum. This is used more particularly in cities where the value of the real property is likely to be largely represented by the buildings.

The third is called the tax and assessment clause. This makes all unpaid taxes and assessments a part of the sum secured and collectible like the interest. The effect of this is to make the whole amount of the mortgage due provided the mortgageor should fail to repay to the mortgagee the amount of any tax paid by him within the specified number of days after such payment by the mortgagee.

**The Debt.**—It follows from the definition that a mortgage is given as collateral security and usually for a debt, though it may be given to secure the performance of some act, or for some other purpose. When it is used in the ordinary way the debt which it secures is usually represented by a bond, or one or more promissory notes, according to the custom of the state in which the property is located. If notes are used they are made in the usual form. In case the interest, insurance, tax and assessment clauses are embodied in the mortgage, they should also appear in the bond. The following, after inserting these clauses, is the form of bond to which the foregoing mortgage would be collateral:

#### BOND.

*Know all Men by these Presents, that I, Oliver D. Reed, of Geneva, Ontario County, New York, am held and firmly bound unto Andrew*

*J. Whitney, of Ithaca, Tompkins County, New York, in the sum of six thousand dollars (\$6,000), to be paid to the said Andrew J. Whitney, or to his certain attorney, executors, administrators or assigns. For which payment, well and truly to be made I bind myself and my heirs, executors or administrators, jointly and severally, firmly by these presents.*

*Sealed this tenth day of January, in the year of our Lord one thousand eight hundred and ninety-two.*

*The Condition of this Obligation is such, That if the above bounden Oliver D. Reed, his heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the above named Andrew J. Whitney, or to his certain attorney, executors, administrators or assigns, the sum of three thousand dollars (\$3,000), in three equal annual payments, with annual interest on all sums at any time remaining unpaid, without fraud or delay, then the preceding obligation to be void; otherwise to remain in full force and virtue.* **OLIVER D. REED.** [SEAL.]

(Acknowledgment same as in mortgage.)

If a real debt existed, as stated in the mortgage, a bond or note would not be necessary to enable the mortgagee to realize the amount of his claim if the premises were worth enough to satisfy it. But his rights stop there, while if he has a bond or note he has a personal claim against the mortgageor and may sue him for any balance left due after the sale of the premises, and the appropriation of the proceeds to the payment of his debt.

**Sale of Mortgaged Premises.**—The giving of a mortgage does not prevent the mortgageor from selling his premises. He still has an interest called an equity of redemption which he may sell. He conveys the property subject to the mortgage, and this should be made to appear in the deed by inserting these or similar words, to wit: "This conveyance is made subject to a certain mortgage made by," etc. (*describing it*). Under such conveyance the grantee must pay the mortgage debt and interest if he wishes to save his property, but he incurs no liability otherwise if he chooses to let the property be sold under the mortgage. Very frequently it is agreed that the grantee shall assume the payment of the mortgage. This is effected by adding to the clause above given after the description of the mortgage, these or similar words: "which said mortgage the party of the second part hereby assumes and agrees to pay as a part of the purchase price of said premises." Accepting a deed containing this clause binds the grantee to make such payment, and should he fail to do so and permit the property to be sold for less than the amount of the mortgage debt, he would be liable to the grantor for damages, and could be sued by the mortgagee and compelled to pay whatever the property lacked of bringing enough to pay the debt.

**Assignment of Mortgage.**—But the mortgagee who has loaned money may wish to make other use of it. In that case he may sell the mortgage, and assign it to the purchaser, who thereupon has all the rights under it which the mortgagee possessed. The purchaser is then known as the *assignee*. The following is a proper form of assignment for a mortgage:

#### ASSIGNMENT OF MORTGAGE.

*This Instrument, made this 24th day of January, 1892, between Andrew D. Whitney, of Ithaca, Tompkins County, New York, of the first part, and John Dunning, of Dryden, Tompkins County, New York, of the second part.*

*Witnesseth, that the party of the first part, for a good and valuable consideration to him in hand paid by the said party of the second part, has sold, assigned, transferred and conveyed, and does hereby sell, assign, transfer and convey, to the party of the second part, a certain mortgage, bearing date the tenth day of January, 1892, made by Oliver D. Reed to Andrew J. Whitney, to secure the payment of the sum of three thousand dollars and interest thereon from the date thereof, recorded in the clerk's office of Tompkins County, in liber 10 of mortgages, at page 251, on the 12th day of January, 1892, at 3 o'clock, P. M., together with the bond accompanying said mortgage, and therein referred to, and all sums of money due and to grow due thereon. And the party of the first part hereby covenants that there is to become due on said bond and mortgage, the sum of three thousand dollars, with interest.*

*In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.*

ANDREW D. WHITNEY. [SEAL.]

(Acknowledgment same as in mortgage, with proper change of names and date.)

**Recording.**—The rule regarding the acknowledgment and recording of mortgages is the same as in the case of deeds. In order to be binding against subsequent purchasers without notice they must be recorded.

**Discharge.**—When a mortgage has been paid it should be discharged of record. The discharge must be executed by the mortgagee if he holds the mortgage at that time, but if not then by the assignee, provided the assignment was recorded. Sometimes when the assignment has not been recorded, a discharge is procured from the mortgagee to save the expense of recording the assignment or to avoid making public the fact that the mortgage had ever been assigned. It is not the duty of the holder of a mortgage to prepare a discharge when the mortgage is paid, because he has no interest in having it discharged. He is bound, however, to execute the discharge upon request, when it is tendered to

him ready for his signature and acknowledgment. The following is a proper form for a discharge by the assignee of the foregoing mortgage:

### DISCHARGE OF MORTGAGE.

*I, John Dunning, of Dryden, Tompkins County, New York, assignee of the mortgage hereinafter described, do hereby certify, that a certain indenture of mortgage, bearing date the tenth day of January, in the year of our Lord one thousand eight hundred and ninety-two, made and executed by Oliver D. Reed to Andrew J. Whitney, and thereafter and on or about the 24th day of January, 1892, by an instrument in writing, duly assigned to me, and recorded in the office of the clerk of the county of Tompkins, in Liber 10 of Mortgages, at page 251, on the 26th day of January, 1892, at 3 o'clock, P. M., is redeemed, paid off, satisfied and discharged.*

*Dated the 1st day of May, 1892.*

JOHN DUNNING. [SEAL.]

State of New York, }  
COUNTY OF TOMPKINS, } ss.

*On this first day of May, in the year one thousand eight hundred and ninety-two, before me, the subscriber, personally appeared John Dunning,*

{  
SEAL.  
}

*to me personally known to be the same person described in, and who executed the within instrument, and he acknowledged that he executed the same.*

WALTER WILSON,  
Justice of the Peace.

**Foreclosure.**—In case the mortgageor fails to pay the mortgage debt when due, the mortgagee or assignee may foreclose the mortgage. The manner of doing this depends upon the laws of the state in which the mortgaged property is situated. Ordinarily it may be foreclosed by an action brought in some court of the state, by which a sale of the property is decreed. This is the method most generally adopted, and is considered the preferable one by the larger number of attorneys. The legislatures of many states have enacted laws providing for the foreclosure of mortgages by publication. This is called statute foreclosure, and requires the publication in a newspaper for a specified length of time, of a notice stating, among other things, the amount due and the time and place of sale. The result is, however, in either case, that the premises are sold and the proceeds applied to the payment of the mortgaged debt. If any balance remain it is paid to the mortgageor or his grantee having title to the premises. In case the property does not bring the amount of the debt, a judgment is rendered against the mortgageor for the remainder and his other property may be sold to satisfy it.

**Deed of Trust.**—In some of the states what is known as a deed of trust is used instead of a mortgage. It is an absolute conveyance of the premises in trust for the benefit of the creditor, to some third party called a trustee. In case of the debtor's default in payment the trustee is authorized to sell the property according to law, and satisfy the creditor's claim out of the proceeds of such sale. It is in effect a mortgage. It is not, however, assigned in the same manner. It is usually collateral to a promissory note, which is transferred by indorsement and carries with it all rights of security under the deed of trust.

**Execution.**—What has been said in regard to the execution and delivery of deeds applies substantially to mortgages, deeds of trust, and in fact to assignments and discharges of mortgage.

**Subsequent Mortgage.**—The fact that premises have been mortgaged does not prevent mortgaging them repeatedly thereafter, but the rights of subsequent mortgagees are inferior to those of the first. The holder of any mortgage may foreclose it, but he cannot affect the rights of prior mortgagees, though he does thus destroy or cut off the claim and lien of all subsequent mortgagees. Hence the owner of a subsequent mortgage must purchase the premises when sold under a prior mortgage to protect himself. Mortgages take precedence of each other, therefore, in the order of their priority in execution, delivery and record. But taxes are first liens without reference to the date when they became due, and take precedence of all other incumbrances.

### QUESTIONS.

Define mortgage. What are the parties called? Distinguish between deed and mortgage. What clauses in addition to the defeasance clause are sometimes inserted? Define each. What is said of the debt for which a mortgage may be given. How is it evidenced? What is said of the sale of mortgaged premises? What is the effect of assuming a mortgage? What is said of the assignment of a mortgage? What is the rule regarding the recording of mortgages? How and by whom is a mortgage discharged? What is foreclosure? give process. What is a deed of trust? What is said of subsequent mortgages?

## CHAPTER XLI.

### LANDLORD AND TENANT.

**Definitions.**—The owner of real property may do what he pleases with it, and he may therefore let or rent it to some other person. This he ordinarily does for a specified time, but it may be for an indefinite time. Such renting establishes the relation of landlord and tenant. The owner is then known as the landlord or lessor, and the person to whom he has let the premises as the tenant or lessee. The compensation agreed to be paid by the tenant to the landlord for the use of the premises is usually termed the rent; and the contract between the parties is called a lease.

**Execution.**—Under the Statute of Frauds leases of land for more than one year are void unless made in writing. Leases for one year or less may be oral; and such leases are valid, although the year is to commence at a future day, as where an agreement is made in February by which property is leased for a year from the first day of April following. In some states, however, the statute has been so changed that a lease need not be in writing unless it is for more than three years. Leases are sometimes executed under seal; and they are often acknowledged, which, although desirable, is not necessary unless they are to be recorded. The laws of some states provide that leases for more than a specified number of years must be recorded in order to fully protect the tenant's interests. The lease is ordinarily signed by both parties, and should always be executed in duplicate in order that each party may have one of them. In some localities it is customary to have the lease left with some third person for the benefit of the parties to it.

The following is an ordinary form of lease:

#### LEASE.

*A Lease, made and executed between RICHARD HOWARD, of the city of Auburn, New York, of the first part, and LYMAN SMITH, of the town of Venice, Cayuga County, New York, of the second part, the 4th day of February, in the year of our Lord one thousand eight hundred and ninety-two.*

*In Consideration of the rents and covenants hereinafter expressed, the said party of the first part has demised and leased, and does hereby demise and lease to the said party of the second part the following premises, viz: his farm, consisting of one hundred and fifty acres of land, situate two miles east of Northville, in the town of Genoa, Cayuga County, N. Y., with the privileges and appurtenances, for and during the term of two years, from the first day of April, 1892, which term will end March 31st, 1894. And the said party of the second part covenants that he will pay to the party of the first part, for the use of said premises, the annual rent of five hundred dollars, to be paid in two equal payments of two hundred and fifty dollars each, on the first days of September and March. And provided said party of the second part shall fail to pay said rent, or any part thereof, when it becomes due, it is agreed that said party of the first part may sue for the same, or re-enter said premises, or resort to any legal remedy.*

*The party of the first part agrees to pay all taxes to be assessed on said premises during said term.*

*The party of the second part covenants that at the expiration of said term he will surrender said premises to the party of the first part in as good condition as now, necessary wear and damage by the elements excepted.*

*Witness the hands and seals of the said parties in duplicate, the day and year first above written.*

*RICHARD HOWARD. [SEAL.]*

*In presence of LYMAN SMITH. [SEAL.]*

*A. J. CONGER, Auburn, N. Y.*

**The Term**, that is, the time for which the lease is given, is usually a matter of agreement between the parties, and may generally be as long or as short as they please. There are, however, some exceptions to this as the result of statute restrictions, as in New York, where a lease of farm lands is not legal for more than twelve years. When the term is not specified in the lease, the law will usually presume that it was a renting from year to year, and the landlord cannot remove the tenant until the expiration of a year. And where a tenant has been in possession of premises under a lease for one or more years, and after its expiration continues in such possession, the law will in like manner presume a tenancy from year to year.

**The Rent** is usually specified in the lease, whether oral or written, as well as the time when it is to be paid. Sometimes also the place where payment is to be made is stated, but if the lease be silent in regard to that, it will be payable upon the land. Rent may be made payable at such times as the parties agree upon, but, except in case of farm

lands, in by far the larger number of leases it is made payable monthly, and it is in such cases not due until the end of the month, unless there be a special provision making it payable in advance. If a tenant be in possession of premises without any agreement as to the amount of rent to be paid, the law will give the landlord a reasonable compensation.

**Lessor's Rights.**—The landlord has a right to insist upon the performance of all of the conditions of the lease. He has no right to interfere with the proper use of the premises by the tenant, but he may prevent him from committing waste, that is, doing anything which will permanently injure the property. If the rent is not paid or the tenant does not remove from the premises at the expiration of his term, he may, under the laws of most of the states, recover possession of the property by what are usually termed summary proceedings. They are so called because the tenant may be removed summarily by an order of a court or justice. Ordinarily a tenant may be thus removed within two or three days. Formerly the landlord, in case of nonpayment of rent, could seize any personal property found on the premises to enforce the payment of rent. This was known as *distress for rent*, but it is not now generally allowed, the remedy of evicting the tenant by summary proceedings having taken the place of it.

The landlord, having only parted with the right to possession, yet retains the title, and he may therefore mortgage the premises or sell them, but the grantee or mortgagee takes subject to the tenant's rights.

**Lessee's Rights.**—The tenant has a right to the possession and enjoyment of the premises to such an extent that the landlord can no more enter upon the property without his permission than a stranger, unless the privilege be reserved in the lease. But if the landlord have not a good title to the premises, and the tenant should be evicted, that is, removed from them through due process of law by one having a better title than the landlord, he must abide the result and lose all rights under his lease. The landlord could give him no better claim to the property than he himself possessed. This is the case where a tenant rents property already covered by a mortgage. If the mortgagee forecloses his mortgage, the tenant may be removed, notwithstanding his lease has not expired. But in all such cases the tenant is relieved from his agreement to pay rent to the landlord. Sometimes the lessor agrees to defend the tenant in the possession of the premises, and in such case an eviction of the tenant by some one holding a better title might make the lessor liable for damages.

He has a right to use the property in a proper manner. If there be a wood-lot on a rented farm, the tenant will be entitled to procure therefrom necessary wood for fuel, but he cannot cut wood for sale, or to be used except on the premises. A tenant who holds for an uncertain

time, as a tenant for life, is entitled to all the crops, called emblements, which are on the ground when his lease is terminated, because he could not tell when this might happen, and hence could not provide for it in advance. On the contrary, where his term is definite, the general rule is that he is not entitled to such emblements. For example, a tenant whose lease will expire in the spring, cannot usually hold the crop grown from winter wheat sown the preceding autumn, without a special agreement to that effect, though in some states he is entitled to a crop thus grown.

The tenant may also sell his interest, sometimes called lease-hold interest, in the absence of any agreement to the contrary in his lease. He may do this by sub-letting, or he may assign his lease. By the first method he stands in the position of a landlord to the new tenant, who has no dealings with the owner, and in the second the new tenant takes the place of the former one and pays his rent to the landlord, but in neither case is the first tenant relieved from liability to his landlord. It is quite customary to insert a clause in leases by which the tenant covenants not to sub-let the premises or any part thereof, or assign the lease without the consent of the landlord. Some states provide by statute that the tenant shall not sub-let without the landlord's consent if the lease is for a short term, two or three years.

**Repairs.**—Unless there is a special agreement to that effect, the landlord is not bound to make repairs, no matter how uninhabitable the premises may become. If any repairs are needed the tenant must make them at his own expense, or do without them. When such repairs are necessary to put and keep the premises in as good condition as when rented, except for ordinary wear, then the tenant must make them. This requires him to replace broken glass, keep up fences, and the like. But, even if he has covenanted in his lease to repair, he need not make good damages caused by fire or other inevitable accidents.

**Fixtures.**—Very important questions frequently arise between landlord and tenant in regard to fixtures. In general whatever a person builds upon or into the property of another belongs to the latter, but this rule has been considerably modified in its application to landlords and tenants. A tenant may remove things that he has annexed to the land or buildings for the purpose of trade or manufacture, unless the same are built or fixed into the wall of a building so as to be essential to its support. A tenant who makes additions to the property or improvements upon it for his own better use of the same, may remove such additions or fixtures, provided such removal will not leave the premises in a worse condition than they were when he took possession. Such removal must be made before his term expires, or he will be held to have waived his right.

**Recovering Possession.**—Under an ordinary lease like the one given in the text, when the term expires the landlord is entitled to possession, and the tenant must remove, and if he does not the landlord may remove him by summary proceedings. But when the term is indefinite, or where by agreement or presumption of law the letting is from year to year, the tenancy cannot be terminated by either party without giving to the other six months' notice, or such other notice as may be prescribed by the statutes of the particular state. In the absence of statutory provisions, it must be a six months' notice. Where the renting is by the month it is usually necessary to give a month's notice, and similarly a week's notice in case the renting is by the week. The landlord cannot evict the tenant without giving such notice, and if the tenant leaves or sub-lets the premises without having given the necessary notice, the landlord may still hold him for the payment of rent unless he accepts the surrender, or adopts the sub-tenant, by receiving rent from him. The following is a proper form of notice from landlord to tenant for the purpose of terminating a tenancy from year to year, or for an indefinite time. It may be readily varied to suit the case, where the renting is for a shorter period.

## NOTICE TO QUIT.

*I hereby give you notice to quit and deliver up on the first day of April next, the possession of the farm which you now hold of me as a tenant.*

*Dated Jan. 11, 1892.*

To A. C. KENDALL,  
Tenant.

JAMES M. BANCROFT,  
Landlord.

The following would be a proper form of notice from the same tenant to his landlord:

## NOTICE TO LANDLORD.

*I hereby give you notice, that I shall quit and deliver up on the first day of April next, the possession of the farm which I now hold of you as a tenant.*

*Dated Jan. 11, 1892.*

To JAMES A. BANCROFT,  
Landlord,

A. C. KENDALL,  
Tenant.

## QUESTIONS.

Define landlord; tenant. What is the rent? Define lease; how may it be made? what should it contain? What is said regarding the term? the rent? What rights has the lessor? lessee? What is said regarding repairs? fixtures? How may the landlord recover possession? To what notice is the tenant entitled?

# APPENDIX.

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## CHAPTER XLII.

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### COURTS.

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**Object.**—The different branches of law of which we have treated in the foregoing chapters, simply define the rights of individuals in the different branches of business. But merely to define a person's rights is not sufficient to secure him in their enjoyment. Some means must be provided to enforce a recognition of others' rights on the part of those who are disposed to violate them, and this means we have in the courts of the country. In this country everyone lives under two governments, and is subject to two kinds of law, state and national, consequently it is necessary to have two different kinds of courts, and these we have in our state courts and federal courts.

**Jurisdiction.**—By the term jurisdiction is meant the power to hear and determine a case. The law provides that if a dispute over some fact arises between two individuals, the power to decide it shall be vested in a certain court. This court then has jurisdiction over it. There are two general kinds of jurisdiction, original and appellate. By original jurisdiction is meant the power to hear the case first. Appellate jurisdiction is the power to decide a case that is brought to it from another court after having been decided by that court.

**Federal Courts.**—For the purpose of interpreting and applying the Constitution of the United States, and the laws and treaties made in pursuance of it, the constitution provides a judicial department which shall be vested in one supreme court and such inferior courts as congress may from time to time establish. In pursuance of this power congress has established three grades of courts inferior to the supreme court, so that there are four classes of federal courts, viz: Supreme Court, Courts of Appeal, Circuit Courts, and District Courts. The constitution further provides that the judicial power of the United States shall extend to, that is the United States courts shall have jurisdiction over, all cases arising under the constitution, laws, and treaties of the United States; to all cases affecting ambassadors and other public ministers, and

consuls; to all cases of admiralty and maritime jurisdiction; to all cases in which the United States or a state shall be a party; to controversies between citizens of different states, or citizens of the same state claiming lands under grants of different states; and between a state or citizens thereof, and foreign states, citizens or subjects.

**Supreme Court.**—The Supreme Court is the highest judicial tribunal known to this country. It is composed of one chief justice and eight associate justices, appointed by the president of the United States, by and with the consent of the senate. They hold office for life, or during good behavior. The Supreme Court has original jurisdiction in all cases affecting ambassadors and other public ministers and consuls, and cases in which a state shall be a party. In all the other cases before mentioned, the Supreme Court has appellate jurisdiction, with such exceptions and under such regulations as congress may make. The Supreme Court being the highest court in the country is intended merely as a court of last resort, and consequently most of the cases tried in this court are brought there from a lower court through this appellate jurisdiction.

**Courts of Appeal.**—In order to relieve the supreme court of part of its work and enable it to catch up with the work it had on hand, congress has recently established nine courts of appeal. These courts meet, one in each judicial circuit, for the purpose of exercising appellate jurisdiction over many of the less important cases that have heretofore been carried to the supreme court. Cases arising out of patent law, revenue law, and many other cases not involving very important interests, are decided finally by these courts, thus relieving the supreme court of a large amount of work.

**Circuit Courts.**—The United States is divided into nine judicial circuits,<sup>1</sup> with a circuit judge for each circuit, and a circuit court is held in the capital of each state. The circuit courts have original jurisdiction over crimes of a serious nature committed against the United States, and over civil cases involving important interests, and it has appellate jurisdiction over certain classes of cases from the district courts and from the state courts.

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<sup>1</sup> The judicial circuits are as follows: 1. Maine, New Hampshire, Massachusetts and Rhode Island; 2. Vermont, Connecticut and New York; 3. New Jersey, Pennsylvania and Delaware; 4. Maryland, West Virginia, Virginia, North Carolina and South Carolina; 5. Georgia, Florida, Alabama, Mississippi, Louisiana and Texas; 6. Ohio, Michigan, Kentucky and Tennessee; 7. Indiana, Illinois and Wisconsin; 8. Minnesota, Iowa, Missouri, Kansas, Arkansas, Nebraska, Colorado, North Dakota, South Dakota and Wyoming; 9. California, Oregon, Nevada, Montana, Washington and Idaho.

**District Courts.**—The United States is divided into sixty-three districts, in each of which a district court is held, presided over by a district judge. No state constitutes less than a whole district, while some are divided into two and some into three districts.<sup>2</sup> The district courts have original jurisdiction over crimes against the laws of the United States where the punishment does not exceed a fine of five hundred dollars, or six months' imprisonment, and over a large number of different kinds of civil cases not involving very important interests.

**State Courts.**—As we have seen, the United States courts only have jurisdiction over certain classes of cases which are specially enumerated, and these are all cases of a national character, or cases that properly belong to the federal courts. The larger part of cases, both civil and criminal, are merely local, and for the trial of these each state has its own local courts. There are usually four grades of state courts, Supreme, District or Circuit, Justices of the Peace, and Probate.

**Supreme Court.**—The supreme courts in the states like the United States supreme court, are principally courts of appellate jurisdiction, having original jurisdiction in but very few cases. The supreme court consists of a number of judges, from three to five, and even more, usually elected by the people for a term of years. The supreme court is the highest court in the state, and its decision of a case is final, unless it should involve a question which allows it to be taken to the United States courts. In some states the business of the supreme court has become so heavy that a court of appeals has been established for the purpose of deciding, finally, cases not involving very important interests or questions.

**District Courts.**—The states are divided into districts, or circuits as they are called in some states, each of which has its own court. These districts are composed sometimes of one county and sometimes of several, and where a district is composed of several, court is held in each county. These courts bear about the same relation to the judicial department of the state that the circuit courts do to the United States. They have original jurisdiction over the more important civil and criminal cases and appellate jurisdiction over cases brought from the lower courts. Sometimes where a district has a large amount of business it has two courts, one for the less important and the other for the more important cases.

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<sup>2</sup> The districts are constituted as follows: Alabama, New York and Texas each have three districts; Arkansas, Florida, Georgia, Illinois, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia and Wisconsin two each; all other states one each.

**Justice's Courts.**—Justices of the peace are officers elected in each township for the purpose of holding township courts. These courts being the lowest in the state have no appellate jurisdiction, but have original jurisdiction over crimes with only small penalties attached, and in civil cases where the amount in controversy is small, the limit being usually about three hundred dollars.

**Probate Courts,** presided over by a probate judge, are held in each county. They have jurisdiction only over special classes of cases. They have charge of the estates of deceased persons, appoint administrators, guardians for minors, and in their office wills are filed. They hold inquisitions of lunacy and drunkenness in many states, and appoint guardians for lunatics and habitual drunkards.

**Officers.**—In addition to the judges there are quite a number of other officers connected with these courts.

**The Clerk** has charge of the records and the seal of the court, issues papers connected with the business of the court, such as summons for the party who has been sued, subpoenas for witnesses and jurors, warrants for the arrest of criminals, etc.

**The Sheriff** is the executive officer of the court serving the summons, subpoena, warrant, etc. The executive officer of a justice's court is called a constable, and of the United States courts a marshal.

**The Bailiff** keeps order in the court room during the session of the court, calls witnesses and jurors into court, and has charge of the jury while they are deliberating over their verdict.

**Attorneys, or lawyers,** are men educated in the law, who make it a business to conduct cases for others. A person has a perfect right to conduct his own case if he so desires, but since to properly conduct a case requires a legal education, it is seldom done except by lawyers hired for the purpose.

**The Stenographer** is a shorthand writer who takes down in shorthand the proceedings of the court, such as the testimony of the witnesses, including the questions of the lawyers, the objections of the lawyers and decisions of the judge. In case the suit is carried to a higher court, all these things are written out in order that the court to which it is appealed can know just what transpired in the court below.

**The Reporter** is the officer who prepares the proceedings of the supreme court and some other courts for publication. In these courts the arguments of the lawyers and decisions of the judges are made in writing, and the reporter collects these, arranges them, and when he has enough for a volume has them printed.

**Terms.**—Most of these courts have a certain time for meeting. Some of them meet once in each year, and others two or three and even

more times. Each regular meeting of a court is called a term, and is spoken of as the October term or the December term, according to the month of beginning. A term lasts until the business of the court is done or it adjourns for the term without completing its work.

#### QUESTIONS.

What are the objects of courts? What is meant by jurisdiction? What kinds are there? What two kinds of courts have we? What are federal courts? What grades are there? Define each. What are state courts? What grades are there? Define each? What officers are connected with the courts beside the judges? Give the duties of each. What is a term of court?

## CHAPTER XLIII.

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### PLEADING AND PRACTICE.

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**Actions.**—As we have seen, the law provides for enforcing rights and redressing wrongs by actions. For the welfare of society, men are not allowed to enforce their own rights and redress their own wrongs, but courts are established for this purpose, and an action is simply a process by which a court arrives at a decision as to whether a right has been violated or an injury suffered. There are two general kinds of actions, criminal and civil.

**Criminal Actions** are the means provided for determining and punishing violations of the criminal law. It is sometimes difficult to tell from the nature of an act itself whether it is a crime or a tort, but the kind of action by which it is redressed always determines this. In a criminal action the theory is that the individual has wronged society, consequently the state or the United States takes up the case and prosecutes it for the injured party, and the remedy is not a payment of money to the injured party, but simply a punishment by fine, imprisonment, or otherwise, of the criminal. Since the criminal law is outside the scope of this book, criminal actions need not be considered any further.

**Civil Actions** are the means provided for determining and enforcing private rights and redressing private wrongs. One man owes a debt to another which he refuses to pay. The injured party makes a statement of this fact in the proper manner to the proper court. The court hears both sides of the case and decides the question. This is a civil action because one individual comes before the court and asks that a private right be enforced. Under the common law there were a large number of different kinds of civil actions; each different kind of injury having a special kind of action by which it was redressed. These large numbers of different forms caused a great deal of needless work and confusion, so that many states have passed laws abolishing them and providing that all kinds of private injuries shall be redressed by one kind of action.

**Parties.**—Of course, there must be two parties to every action; the party who brings the action, known as the plaintiff, and the party

against whom the action is brought, known as the defendant. In a criminal action the plaintiff is always the State or the United States, and the defendant is the one accused of crime. Anyone competent to sue or be sued may be a party in a civil action. The rules as to competency are about the same as in parties to a contract. Persons who are incompetent, however, if they desire to bring a suit, may sometimes have a guardian appointed for this purpose, and then they may bring suit the same as though competent.

**Garnishee.**—Sometimes in a suit to recover money, a third party, called a garnishee, is brought in. A garnishee is an outside party supposed to owe the defendant money, who is ordered not to pay that money to the defendant but to pay it into court, or keep it subject to the order of the court. Suppose A sues B to recover money due him, which B refuses to pay. Before or during the progress of the suit, A learns that C is indebted to B. A then has a garnishment summons issued for C which orders him not to turn over any money which he may have belonging to B, and also orders him to appear in court and answer questions concerning his indebtedness. If on examination it is discovered that he is indebted to B, and the debt is one which by law is subject to garnishment, the money is either ordered to be paid into court or he is ordered to keep it subject to order from the court. Then if in the suit judgment is rendered against B, the money, or a portion of it, is given to A.

**Summons.**—If one person wishes to sue another, the first thing necessary is that the person sued be notified of the fact that he has been sued, and this notification is given by what is called a summons. The clerk of the court in which the suit is brought, if it has a clerk, and if not then the judge, writes out a notice to the defendant saying that he has been sued, states the cause of action, the amount claimed, and the time he has in which to state his defense. This summons is served on the defendant by the sheriff, constable, or marshal, by delivering a copy of it to him or leaving a copy of it at his residence if he is not at home.

**Pleadings.**—Before a court can decide a case it must be brought before it in such a manner that some fact or facts are alleged by the plaintiff and denied by the defendant. This condition of affairs is brought about by what are called the pleadings, which are simply the statements made by the parties of their respective sides of the case. Under the common law there were a large number of parts to the pleadings, and they were required to be very technical, but most of the states have adopted rules of pleading which very much simplify them. Under the law of most states the pleadings consist of the plaintiff's petition or

declaration, the defendant's plea or answer, the plaintiff's replication, and a demurrer which may be filed by either party.

**Petition.**—The petition, or declaration as it is called in some states, consists simply of a plain and concise statement of the cause of action which the plaintiff has against the defendant. If the action is for damages for a breach of contract, it is necessary for the plaintiff to set forth, (1) the contract on which the action is based; (2) the fact that the contract has been broken and injury sustained; and (3) the amount of damages claimed. Different causes of action of course require different forms of statement, and in all forms there is more or less of technicality which must be followed, such as setting forth the names of the parties, the name of the court in which the action is brought, etc. Although the pleadings are properly treated together in a discussion of them, as a matter of fact, the petition is generally filed before the summons, spoken of above, is issued, the summons being made out from the facts stated in the petition. If the suit is before a justice of the peace, this first pleading is called a bill of particulars, and need not then be as technical as if in a higher court.

**Answer.**—The answer of the defendant, or plea as it is sometimes called, is simply a statement of the defendant's defense against the action of the plaintiff. In a former chapter we have stated and described the principal defenses that may be set up in an action, and the statement of this defense constitutes the defendant's answer. The summons which notifies him that he has been sued states the time he has in which to file his answer, and if it is not filed in the required time it is not good, and judgment is rendered against him. The answer may either deny the facts set forth in the plaintiff's petition or admit them, and set up other facts by way of excuse.

**Replication.**—If the defendant's answer denies the facts alleged by the plaintiff, the issues are said to be made up. Certain facts are set forth as true by the plaintiff and denied by the defendant, and the trial is simply to determine the truth or falsity of these facts. If, however, the defendant instead of denying the facts alleged by the plaintiff admits their truth and sets up new facts as a justification, the plaintiff must make answer to these new facts which he does in what is called the replication, or simply the reply. This again may be simply a denial, or new facts in justification.

**Demurrer.**—It may happen at sometime during the course of the pleadings that one party may think that the facts set up by the other, even if true, do not, in law, constitute a justification, and consequently it is unnecessary for him either to deny or justify with new facts. Under these circumstances he demurs to the pleading of the other;

that is, he says for answer, that the pleading of the other is not sufficient in law. In case of a demurrer, only the law is decided by the judge, and if the pleadings are insufficient they are corrected before anything further can be done. If they are decided to be sufficient, the party who has demurred must then answer to the facts and the trial proceeds.

**Change of Venue.**—Sometimes it is believed that a fair and impartial trial cannot be had before the court in which the action is brought. When this is the case, application is made for what is called a change of venue, that is, a change in the place of trial. Such a change will be granted whenever circumstances are such that a perfectly impartial trial is impossible in the place where the action is brought. Instances of such cases are, where from the public interest taken in the trial, an unprejudiced jury cannot be secured within the jurisdiction of the court, or the judge before whom it is to be tried is prejudiced.

**Continuance.**—To get a complicated case ready for trial involves a vast amount of work, consequently it frequently occurs that when the proper time comes, and the case is called for trial, one of the parties is not ready. Application is then made for a continuance, that is, that the case be continued on the docket until the next term of court, or in justices' courts that do not go by terms, for a certain number of days. If it can be shown to the satisfaction of the judge that the party making the application, by the exercise of diligence has been unable to get ready for trial, a continuance will be granted.

**Witnesses.**—The facts alleged in the pleadings can, of course, only be proved by the testimony of witnesses, persons who know something about them. In order to get the witnesses into court a subpoena is issued for each one. This is simply an order from the court to them to appear in court at a certain time and place to testify to what they know about a certain case. A failure to so appear without a legal excuse constitutes a contempt of court, for which the party is liable to a fine. So also, a refusal to testify when once in court constitutes a contempt of court.

**Depositions.**—In a civil case a witness cannot generally be compelled to leave his own county, and if his testimony is necessary outside the county it must be secured in some other way. This is done by what is called taking his deposition. The party who desires his testimony gives notice to the other party of the time and place of taking the deposition, and written questions are prepared in such a way as to bring out the witness's knowledge of the subject and sent to an officer to be asked the person, or the parties go in person and ask the questions. This is done in the presence of a proper officer, usually a notary public or jus-

tice of the peace, the questions and answers are sealed up and sent to the clerk of the court where the testimony is to be used. This is read at the proper time in the trial as the testimony of the witness.

**Jury.**—Generally in important cases where there is a dispute with regard to facts, the parties are allowed a trial by jury. A jury consists usually of twelve men, unless the trial is before a justice of the peace, when it is six. In selecting a jury the required number of men are called and the parties are allowed to question them to see if they know anything about the case, or if there are any other circumstances which would be likely to hinder them from rendering an impartial verdict. If one is found in any way disqualified he is dismissed and another summoned in his place. This process is kept up until a jury is found to no one of which objection can be raised, and then the trial proceeds.

**Trial.**—The object of the trial is simply to get the evidence before the jury to enable them to decide as to the truth of the facts, and of course it is the aim of each party to get the testimony before the jury in such a way as to prove as much as possible for his side of the case. The plaintiff having to make out his case, that is, introduce such evidence as in the absence of anything contradictory will entitle him to a judgment, he introduces his witnesses before the defendant is obliged to do anything. His side of the case having been completed, the defendant introduces his testimony. After the defendant has finished, the plaintiff is allowed to bring in new witnesses, or old ones again, for the purpose of contradicting the evidence brought out by the defendant. The evidence on both sides having been all introduced, the case is left with the jury to decide.

**Verdict.**—Although the trial is complete, and all that is necessary is for the jury to decide, to render a verdict as it is called, two further steps are usually taken to assist the jury in their decision,—the arguments of the counsel, and the judge's charge. The lawyers take up the evidence and endeavor to explain it to the jury in such a way as to secure a verdict for their side of the case. The province of the jury is simply to decide facts; but, in connection with disputed facts, there is always more or less dispute about the law governing them, and in order to take the decision of these points of law out of the hands of the jury, the judge decides for them, sometimes in writing, sometimes orally, the legal questions involved; this is called charging the jury. The jury are then taken to a room by themselves where they deliberate on the evidence and endeavor to come to some agreement as to how the case should be decided. Whenever all have agreed upon the same verdict they return into court with it, hand it to the clerk, who reads it, and are then dismissed. Should

they fail to unanimously agree on a decision they are kept together as long as there is any likelihood that they may finally agree, and when it becomes evident that there is no such likelihood they are dismissed and the case must be tried over again before a new jury. After a verdict has been rendered two steps ordinarily remain, judgment and execution.

**Judgment.**—The province of the jury, as we have already seen, is simply to find what facts are true. If it is a civil suit, in which damages are asked, the jury finds that a certain amount of damages ought to be awarded; if it is a criminal prosecution, they find that the defendant is guilty of a certain crime. It remains now for the judge to say that the defendant shall pay the plaintiff a certain sum as damages, or that a certain punishment shall be inflicted on the defendant. This is the judgment of the court. In a civil action, the party against whom judgment is rendered is also ordered to pay costs.

**Execution** is the carrying into effect of the judgment of the court. Where the judgment is that the defendant shall pay damages to the plaintiff, the execution will compel him to do this if he has any property which is not exempt from forced sale under execution. In most of the states every one has allowed him certain property which cannot be sold in satisfaction of an ordinary judgment, and this is said to be exempt from execution. If the defendant has property which is not thus exempt, and refuses to satisfy, that is, pay the judgment, the sheriff or constable proceeds to levy upon, advertise and sell it, or so much as may be necessary to pay the amount of the judgment. It sometimes happens, however, that the defendant desires to pay the judgment but has not the money just ready. In that case, by giving bond that the judgment will be satisfied, that is, getting some responsible person to agree to pay it if he does not, he can have what is called a stay of execution. He will be given a certain amount of time, say thirty or ninety days, in which to make payment, and execution will not be issued until the time has passed.

**New Trial.**—It frequently happens that the judge, in the course of the trial, makes some ruling on a point of law which one of the parties considers erroneous. When this is true, after the trial is finished and the judgment rendered, if it is against the party who considers the error to have been made, application is made for a new trial. Or it may be that the party against whom the judgment has been rendered has, since the trial, discovered some new evidence, in which case, also, such application is made. If the judge can be convinced that he has made an error in any of his rulings, or that some new and material evidence has been discovered since the trial, which, by the exercise of diligence could

not have been discovered before, a new trial is granted, and the case is tried again before the same court and a new jury. If the judge refuses to grant a new trial, the only further chance the party has is to take an appeal.

**Appeal.**—By appeal is meant taking the case to a higher court, but appeal is not the proper technical term to apply to the ordinary removal of a case to a higher court. In an actual appeal the whole case, both law and fact, is examined, whereas ordinarily only the law is re-examined. Removal by what is called a writ of error, is the method employed where the case has been tried by a jury. When the judge in the court below refuses to grant a new trial, the party applying for it makes a statement which sets forth the errors he believes the judge to have made in deciding points of law, and asks the higher court to decide these same points. This is done, and if the higher court agrees with the lower, the decision is said to be affirmed; if it does not agree, the decision is reversed and the case sent back to be tried over again; that is, the higher court says the lower court ought to have granted a new trial and orders it to do so. Of course, during all this time there is a stay of execution, and the judgment will remain unsatisfied until the case is finally decided, either by the parties failing to take an appeal, or the higher court affirming the decision of the lower court.

#### QUESTIONS,

Define action; what kinds are there? define each. What are the parties called? Who may be a party? What is a garnishee? What is a summons? Of what do the pleadings consist? Define each part. What is change of venue? when granted? What is a continuance? when granted? What are witnesses? depositions? What is a jury? How is the trial conducted? What is a verdict? judgment? execution? When will a new trial be granted? What is a writ of error?

## GLOSSARY.

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- Abandonment.** In marine insurance, the giving up of property partly destroyed, by the owner to the insurer.
- Abolish.** To make void; to cancel.
- Abrogate.** To repeal; to annul; to abolish entirely.
- Acceptance.** In mercantile law. (1) The act by which the person upon whom a bill of exchange or other order is drawn, engages to pay it. (2) The bill after it has been accepted.
- Acceptor.** One who accepts an order, a draft, or bill of exchange.
- Accommodation Paper.** Commercial paper for which no consideration passed between the original parties.
- Accord.** Agreement.
- Acknowledgment.** The act by which a party who has executed an instrument declares or *acknowledges* it before a competent officer to be his or her act or deed.
- Action.** The formal means of recovering one's right in a court of justice—a suit.
- Act of God.** Any accident produced by a physical cause which is irresistible, such as lightning, tempest, etc.
- Administrator.** One who is appointed to take charge of the property or estate of a person dying without having made a will and is accountable for the same.
- Affreightment.** The hiring of a ship for the conveyance of goods.
- Affinity.** The connection which arises by marriage between each of the married persons and the kindred of the other.
- Agency.** The relation existing between two parties, by which one is authorized to do certain acts for the other, with other parties.
- Agent.** Any person who is employed by another to do any act for the employer's benefit or account.
- Age of Consent.** The age at which infants are capable of making a valid contract of marriage.
- Alien Enemy.** An alien who is the subject of a hostile power.
- Alimony.** An allowance made to a wife out of her husband's estate during a suit for divorce or separation, or at its termination, for her life or for a shorter period.
- Amotion.** Removal of an officer of a corporation.
- Ante-dated.** Dated at a time earlier than the actual date.
- Annulment.** The act of making void.
- Appurtenances.** Things belonging to another thing.
- Arbitration.** The investigation and determination of a cause or matter in controversy by an unofficial person or persons mutually chosen by the contending parties.
- Articles of Copartnership.** The written agreement by which a copartnership is formed.
- Assault.** An illegal and forcible attempt or offer to do a bodily harm to another.
- Assent.** Act of agreeing to anything; consent.
- Assets.** Property available for the payment of debts.
- Assignee.** The person to whom the failing debtor transfers all his remaining property for the purpose of having it distributed among his creditors. One to whom anything is assigned.

- Assignment.** A transfer by a failing debtor of his property to an assignee. A transfer by one person to another of any property, personal or real.
- Assignor.** One who assigns property.
- Assurance and Assured.** Same as *Insurance* and *Insured*.
- Award.** The decision of arbitrators.
- Bailment.** A delivery of goods in trust upon a contract, express or implied, that the trust shall be faithfully executed on the part of the bailee. The *bailor* is he who delivers; the *bailee*, he to whom delivery is made.
- Bank Bill.** A written promise to pay to the bearer on demand a certain sum of money, issued by a bank and used as money.
- Bank Note.** Same as *Bank Bill*. Also, a common promissory note made payable at a bank.
- Bankruptcy.** The condition of one who has been declared by a court of bankruptcy to be a bankrupt.
- Barratry.** Any breach of duty committed by the master of a vessel or the seamen, without the consent of the owner, by reason of which the ship or cargo is injured.
- Barter.** To trade by exchange of goods, in distinction from trading by the use of money.
- Beneficiary.** (1) In life insurance, the person to whom a policy is made payable. (2) The person for whose benefit another holds the legal title to real estate.
- Beyond Seas.** Denotes absence from the country, and generally held to mean absence from the particular state.
- Bill of Exchange.** A direction in writing, by the person who signs it, ordering the one to whom it is addressed to pay a third person a definite sum of money at a specified time.
- Bill of Lading.** A document delivered by a carrier to one sending goods by him, acknowledging that they have been received by him for transportation to a certain place. It is both a receipt and a contract.
- Blank Indorsement.** One in which no particular person is named as the one to whom payment is to be made. It consists of the indorser's name alone.
- Bond.** A written and sealed instrument by which one agrees to pay to another a certain amount of money, unless something else specified therein is done.
- Bottomry Bond.** An obligation given for a loan upon a vessel and accruing freight.
- Breach.** In the law of contracts, the violation of an agreement or obligation.
- By-Bidder.** A person employed to bid at auctions in order to raise the price of articles to be sold, and with an understanding that his bids are not to be binding on himself.
- By-Laws.** The private laws or regulations made by a corporation for its own government.
- Capital Stock.** The fund or property, as a whole, contributed or supposed to have been contributed to a corporation at its organization, as its property.
- Caveat Emptor.** Latin phrase, meaning "let the purchaser beware," and applies to a case in which the thing sold is before the buyer and he examines it.
- Certificate of Deposit.** A certificate issued by a bank or banker, showing that a certain sum of money has been deposited there, payable to a certain person, or to his order, or to the bearer.
- Certificate of Stock.** A certificate given by the proper officers of a corporation, showing that a certain person owns a certain number of shares of the capital stock.
- Certification (of check).** The signature of the proper officer of the bank written across its face, sometimes with and sometimes without the word "certified," or "good." It is a recognition of the check by the bank as good and the bank is bound to pay it.

- Charter.** (1) A special act of legislature creating a particular corporation. (2) To hire or let a vessel or part of it.
- Chartered Ship.** One let wholly or in part.
- Charter Party.** The written instrument by which the owner of a vessel lets it, or a part of it, to another.
- Chattel Mortgage.** A conditional sale of personal property, one which is to become void if a certain thing happens. Chiefly used as a security for the payment of money.
- Chattels.** Commonly means goods of any kind, or every species of personal property.
- Check.** A written order for money drawn upon a bank or banker, and payable immediately.
- Chose in Action.** A thing of which one has not the possession, but only a right to demand by action at law.
- Chose in Possession.** Personal property of which one has the actual possession.
- Civil Law.** The system of law of ancient Rome. Also used in distinction from criminal law.
- Civil Remedy.** The method of redressing, by means of a suit for damages or for specific performance, an injury inflicted by one person upon another.
- Collateral.** Property pledged as security for the performance of a contract.
- Common Carrier.** One who, as a business, undertakes for hire to transport from place to place, passengers or goods of all who choose to employ him.
- Common Law.** The old law of England that derives its force from long usage and custom.
- Competency.** The legal fitness of a witness to give evidence on the trial of an action.
- Composition Deed.** An agreement between an insolvent debtor and his creditors by which, upon payment to each of some fixed proportion of his claim, they all agree to release the debtor from the balance of their claims.
- Compromise.** An agreement between a debtor and his creditors, by which they agree to accept a certain proportion of the amounts claimed and discharge him from the remainder.
- Concurrent.** Existing together.
- Condition Precedent.** An act which must be performed by one person before another is liable, or in order to make him liable.
- Consanguinity.** Relation by blood.
- Consideration.** The reason or inducement in a contract upon which the parties consent to be bound.
- Consignee.** One to whom merchandise, given to a carrier by another person for transportation is directed.
- Consignor.** One who gives merchandise to a carrier for transportation to another.
- Conveyance.** (1) The act of carrying by land or water. (2) The means of conveyance. (3) A written instrument by which an estate in lands is transferred from one to another.
- Copartnership.** Same as partnership.
- Corporation.** An artificial being or person endowed by law with the capacity of perpetual succession, and of acting in certain respects like a natural person. When it consists of one individual it is termed a corporation *sole*, and when composed of a collection of several individuals it is called a corporation *aggregate*.
- Counter-Claim.** Same as *Set-off*.
- Course of Exchange.** The current price of bills of exchange between two places.
- Covenant.** Any promise contained in a sealed instrument.
- Coverture.** The legal state and condition of a married woman.

- Criminal Remedy.** The method of punishing a wrong-doer for some wrong committed by him against society.
- Curtesy.** The estate a man has in the lands of his wife upon her death, in case a living child has been born to them during their marriage.
- Damages.** Compensation in money to be paid by one person to another for an injury inflicted by the former upon the latter.
- Day.** Twenty-four hours. An entire day.
- Days of Grace.** Days (usually three) allowed by custom for the payment of bills and notes beyond the day expressed for payment on the face of them.
- Default.** Omission; neglect or failure.
- Defense.** A legal excuse made by the defendant to the plaintiff's action, showing why he ought not to be responsible to the plaintiff in damages for an injury.
- Demand.** Presentment for payment.
- Demurrage.** The allowance to be made by the shipper to the vessel owner as damages for detention of the vessel beyond the time specified in the charter party.
- Deposit.** A bailment or delivery of goods to be kept and returned without recompense.
- Deviation.** In the law of marine insurance, a voluntary departure without necessity from the regular course of the specific voyage insured.
- Disability.** Want of qualification; incapacity to do a legal act.
- Disaffirmance.** The annulling or cancelling of a voidable contract.
- Discount.** (1) The taking of interest in advance. (2) A deduction from a price asked, or from an account, debt, or demand.
- Disfranchisement.** Expulsion of a member from a corporation.
- Dishonor.** The non-payment of negotiable paper when it is due.
- Distress.** The taking of personal property to enforce the payment of something due, as rent.
- Divorce.** The separation of husband and wife by the sentence of the law.
- Domestic Relations.** The relations of the members of a household or family.
- Dower.** The right of a widow to the use or ownership of some portion of the real estate owned by her husband.
- Draft.** Same as bill of exchange.
- Drawee.** The person upon whom a bill of exchange is drawn, who is directed to make the payment.
- Drawer.** The person who draws or makes a bill of exchange.
- Duress.** Personal restraint or compulsion.
- Easement.** The right to use another's land.
- Effects.** All kinds of personal property.
- Emblements.** Growing crops of any kind produced by expense and labor.
- Eminent Domain.** The right of the sovereign power to take private property for public purposes.
- Enact.** To make a law or establish by law.
- Equity of Redemption.** The right which a mortgagor has to redeem his estate after the mortgage has become due.
- Escheat.** The reverting of land to the state upon the death of the owner without lawful heirs.
- Escrow.** A deed or bond delivered to a third party to be held and delivered to the grantee or creditor upon the performance of some condition.
- Estate.** An interest in property.
- Executed (of a contract).** Finished.
- Execution.** (1) A written command issued to a sheriff or constable, after a judgment, directing him to enforce it. (2) The act of signing and sealing a legal instrument, or giving it the form required to make it a valid act.

**Executory** (of a contract). Unfinished.

**Fee Simple.** Full ownership in lands.

**Feud.** An estate in land, held of a superior by service; a fief.

**Fendal System.** The system of feuds or fiefs.

**Firm.** All the members of a partnership taken collectively.

**Foreclosure.** The process of cutting off the right or interest of the mortgageor and his assignees in mortgaged premises.

**Forfeiture.** A loss of property, right, or office, as a punishment for some illegal act or negligence. Sometimes used for the thing forfeited.

**Forgery.** The fraudulent making or altering of a written instrument.

**Franchise.** A privilege, or right, conferred by grant from government upon individuals.

**Fraud.** Any cunning, deception, or artifice used to circumvent, cheat, or deceive another.

**Freight.** The compensation to be paid a carrier for the transportation of goods, or the goods themselves while being transported.

**General Average.** A contribution made by the owners of a vessel and cargo toward the loss sustained by one of their number, whose property has been sacrificed for the general safety.

**General Ship.** A vessel navigated by its owner, receiving and carrying freight indifferently for all who apply.

**Goods.** Same as *chattels* and *effects*.

**Good Will.** Benefit arising from the fact that persons used to trading or doing business at a particular place will continue to do so; it is a property subject to transfer.

**Guaranty.** A contract whereby one person engages to be answerable for the debt or default of another person. *Guarantor* is he who makes the guaranty.

**Guardian.** One who is entitled to the custody of the person or property of an infant, or one who is not able to take care of himself, as an idiot or insane person.

**Guest.** A person received and entertained at an inn or hotel.

**Idiot.** One who never had reasoning power.

**Inchoate.** Incipient; incomplete.

**Incompetency.** Lack of necessary legal qualifications.

**Incorporate.** To form into a corporation.

**Indemnity.** Compensation for damage suffered, or that which is given or promised to a person to prevent his suffering damage.

**Indorsement** (of negotiable paper). (1) A name, with or without other words, written on the back of the paper. (2) The agreement implied in one's writing his name on the back of negotiable paper, to pay it if the principal debtor does not. The one who makes the indorsement is called the *indorser*. The person in whose favor the indorsement is made is called the *indorsee*.

**Infant.** In law, is one under the age of twenty-one years.

**Injunction.** An order or direction of the court compelling a certain person to refrain from doing some particular act or thing.

**Insolvency.** State of being unable to pay one's debts.

**Insurable Interest.** Such an interest in the thing insured that the person possessing it may be injured by the risk to which the thing insured is exposed.

**Insurance.** A contract of indemnity against loss from certain causes. The *insurer* is the party agreeing to make the insurance.

**Invalid.** Of no legal force.

**Inventory.** (1) An account or catalogue of goods or movables. (2) In law a list or schedule in writing of the goods, chattels, and credits (and sometimes of the real estate) of a testator or intestate, made by an executor or administrator.

**Joint-Stock Company.** A species of partnership possessing some of the characteristics of corporations.

**Judgment.** The sentence of the law pronounced by the court upon any matter contained in the record, or in any case tried by the court.

**Judgment Debtor.** Party against whom a judgment is obtained.

**Landlord.** (1) One who owns and rents or leases lands or houses. (2) The keeper of an inn.

**Law Merchant.** The general body of usages in matters relative to commerce.

**Lease.** A contract by which one grants to another for a period the use of certain real estate.

**Legal Tender.** That kind of money which by law can be offered in payment of a debt.

**Letter of Credit.** A written direction by some well-known banker authorizing the party to whom it is addressed to draw upon him in a particular manner for any amount he chooses up to a specified limit.

**Libel.** To defame by published writing, printing, signs, or pictures.

**Lien.** A right which one person has to retain the property of another by way of security for a debt or claim.

**Liquidate.** To pay; to settle an account.

**Litigation.** The act of litigating; judicial contest; a suit at law.

**Lucid Intervals.** Periods from time to time in cases of lunacy in which the person afflicted becomes sane.

**Lunatics.** Persons who have lost their reason.

**Maintenance.** Support by means of food, clothing, and other conveniences.

**Mandate.** A bailment of personal property in which the bailee undertakes without compensation to do something for the bailor with the thing bailed. The bailor is generally termed the *mandator*, and the bailee the *mandatary*.

**Maturity.** The time at which commercial paper legally becomes due.

**Merger.** The absorption or extinguishment of one contract in another.

**Minor.** Same as *Infant*.

**Misdemeanor.** A lower kind of crime; an indictable offense not amounting to felony.

**Misuser.** The abuse of a privilege.

**Month.** Generally in this country, where used in contracts, means a calendar month.

**Mortgage.** A grant or conveyance of an estate or property to a creditor, for the security of a debt, and to become void on payment of such debt. The *mortgagor* is the one who gives the mortgage upon his property; the *mortgagee* the one to whom the mortgage is given.

**Municipal.** Of or belonging to a city; but *municipal law* is the name given to the system of law of any one nation or state.

**National Currency.** National Bank bills.

**Negotiable Paper.** An instrument as a bill or note, which may be transferred from one to another by indorsement.

**Nominal Damages.** Those given for the violation of a right from which no actual loss has resulted.

**Nonuser.** A failure to use rights and privileges.

**Notary Public.** An officer appointed variously under the laws of different states, whose acts are respected by the law-merchant and the law of nations, and hence have force out of their own state or country.

**Open Policy.** One in which there is no valuation of the thing insured.

**Oral Contract.** A contract made by means of spoken words.

**Ordinance.** A rule, or order, or law. Usually applied to the acts or laws passed by the common council of a city.

**Outlawed.** A debt is said to be outlawed when it has existed for such a length of time that the law prevents its being enforced.

**Parol Contract.** Any contract not under seal.

**Partnership.** The relationship resulting from an agreement between two or more persons to place their money effects, labor and skill, or some or all of them, in some enterprise or business, and divide the profits and bear the losses in certain proportions.

**Party-Wall.** A wall common to two adjoining estates.

**Pawn.** A sale of personal property on condition that it may be redeemed within a certain time.

**Payee.** The person to whom the payment of any kind of commercial paper is directed to be made.

**Penalty.** Forfeiture, or sum to be forfeited, for non-performance of an agreement.

**Per Centum or Per Cent.** By the hundred.

**Perils of the Sea.** All the dangers naturally incident to navigation.

**Perjury.** A willfully false statement, by one who is lawfully required to tell the truth, and who is lawfully sworn, made in a judicial proceeding, and in relation to a matter that is material to the point in question.

**Piracy.** Any forcible robbery on the high seas, done without lawful authority, and with wrongful purpose.

**Pledge.** A bailment of personal property to secure the payment of some debt or the fulfillment of some agreement. The bailor is called the *pledgor*, and the bailee the *pledgee*.

**Policy.** The written contract of insurance.

**Post-Dated.** Having a date subsequent to that at which it is actually made.

**Power of Attorney.** A written instrument under seal by which one party appoints another to act for him.

**Premium.** The consideration or price paid for insurance.

**Prescription.** The right to a thing derived from immemorial usage.

**Presumption.** An inference of the law, from certain facts, of the existence or truth of some other fact or proposition.

**Prima Facie.** Literally, at the first appearance. *Prima facie* evidence is that which is sufficient to establish a fact, unless it be rebutted or contradicted.

**Principal.** (1) A party for whom another is authorized to do certain acts with third parties. (2) A sum of money at interest.

**Promissory Note.** A written promise, signed by the person promising, to pay a certain sum of money at a certain time to a person named, or to his order, or to the bearer.

**Prosecute.** To proceed against by legal measures.

**Protest.** A formal declaration in writing by a notary public of the demand and refusal to pay a note or bill.

**Proxy.** (1) One who represents another. (2) A writing by which one authorizes another to vote in his place.

**Public Enemies.** Those who belong to a nation at war with another.

**Puffer.** Same as *By-Bidder*.

**Quasi.** As if; as though. *Quasi* corporations are bodies like corporations and yet are not strictly corporations.

**Ratification.** Giving force to a contract which otherwise is not binding.

**Real Estate.** Same as real property.

**Realty.** Same as real property.

**Receipt.** A written acknowledgment by one receiving money or other property that it has been received.

**Receiver.** Usually means a person appointed by a court to take and hold property in dispute, the property of a bankrupt or the property of a dissolved corporation.

- Recoupment.** A reduction or diminution of damages on account of a breach of warranty or defects in performance.
- Re-enact.** To enact anew.
- Registry.** The entering or recording of real estate conveyances in books of public record.
- Release.** An instrument in the general form of a deed that in distinct terms remits the claim to which it refers; and being under seal, although reciting only a nominal consideration, extinguishes the debt.
- Remedy.** The legal means employed to enforce a right or redress an injury.
- Rent.** Compensation for the use of real property.
- Rescission.** The annulling or dissolution of contracts by mutual consent, or by one party.
- Respondentia Bond.** The obligation given for a loan made upon the cargo of a vessel.
- Revert.** To fall again into the possession of the donor, or of the former proprietor.
- Right of Survivorship.** This means that the survivor or survivors take the right or interest of their deceased joint tenant, which in other cases would go to his heirs.
- Salvage.** Property saved from wreck or loss at sea; or compensation given for service rendered in saving it.
- Satisfaction.** Payment of a legal debt or demand; the discharging or cancelling of a judgment or a mortgage, by paying the amount of it.
- Scrip.** Certificate of stock.
- Seal.** An impression upon any impressible substance; or a piece of paper pasted on with intent to make a seal of it.
- Sea Worthiness.** The fitness of a vessel in all respects of materials, equipment and construction for the service in which it is employed.
- Set-Off.** A claim which one party has against another who has a claim against him; a *counter-claim*.
- Severalty.** A state of separation. An estate in severalty is one held by one person in his own right.
- Shipper.** One who gives merchandise to another for transportation.
- Slander.** Injurious words spoken of another.
- Smart Money.** Damages beyond the thing sued for, allowed on the ground that the offense may be so great that the offender ought to be made an example of.
- Specialty.** A contract under seal.
- Statute.** An act of the Legislature.
- Statute of Frauds.** An English statute, generally re-enacted in this country, requiring certain contracts to be made in writing, designed to prevent fraud and perjury.
- Statute of Limitations.** A statute requiring an action to be commenced within a certain time after the demand has arisen. It *limits* the time to sue, hence its name.
- Stock.** Same as *Capital Stock*. It is also used to denote the shares into which the Capital Stock is divided.
- Stockholder.** The owner of one or more shares of the stock of a corporation.
- Stoppage in Transitu.** A stoppage, by the seller, of goods sold on credit before reaching their destination upon learning of the buyer's insolvency.
- Subject-Matter.** The thing to be done or omitted in a contract.
- Subrogation.** The substitution of one person or thing in the place of another, particularly the substitution of one person in the place of another as a creditor, with a succession to the rights of the latter.
- Suit.** The prosecution of some claim or demand in a court of justice.
- Surety.** One who has agreed with another to make himself responsible for the debt, default, or misconduct of a third party. Similar to *guarantor*.

**Suretyship.** The liability or contract of a surety.

**Surrender Value.** The amount which an insurance company will pay for an unexpired policy.

**Tenant.** One to whom another has granted for a period the use of certain real estate.

**Tender.** An offer of a sum of money in satisfaction of a debt or claim, by producing and offering the amount to the creditor and declaring a willingness to pay it.

**Tort.** A private wrong or injury, other than the breach of a contract, for which damages can be collected.

**Trespass.** Any wrongful act of one person whereby another person is injured.

**Trustee.** One who holds property for the benefit of another.

**Underwriter.** Same as *Insurer*.

**United States Note.** A written promise to pay to the bearer on demand a certain sum of money, issued by the United States Government and used as money.

**Usury.** Illegal interest.

**Validity.** Legal strength or force; the quality of being good in law.

**Valued Policy.** One which fixes the value of the property insured.

**Vassal.** One who held property of a superior or lord.

**Vendee.** One to whom anything is sold; a purchaser; a buyer.

**Vendor.** A seller; the person who sells a thing.

**Void.** Of no force or effect.

**Voidable.** That may be avoided; not absolutely void.

**Waiver.** The abandonment of a right, or a refusal to accept it.

**Ward.** A minor under guardianship.

**Warranty.** An agreement to hold one's self responsible, if a certain thing does not turn out as represented.

# FORMS.

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## PROMISSORY NOTE—NON-INTEREST BEARING.

\$325 $\frac{53}{100}$ .

JAMESTOWN, N. Y., Oct. 15, 1892.

*Thirty days after date, I promise to pay Walter H. Montgomery, or order, Three Hundred Twenty-five  $\frac{53}{100}$  Dollars, value received.*

CHARLES E. WILSON.

## PROMISSORY NOTE—INTEREST BEARING.

\$450 $\frac{00}{100}$ .

CLEVELAND, O., Nov. 7, 1892.

*Six months after date, we promise to pay Henry D. Kepler, or order, Four Hundred Fifty Dollars, value received, at Second National Bank, with interest.*

JOHNSON & BROWN.

## PROMISSORY NOTE—JOINT AND SEVERAL.

\$1124 $\frac{36}{100}$ .

WORCESTER, MASS., Oct. 4, 1892.

*Two months after date, we jointly and severally promise to pay William Taylor & Son, or order, Eleven Hundred Twenty-four  $\frac{36}{100}$  Dollars, value received, with interest at 5%.*

EDWARD THOMPSON.

HENRY D. BROWN.

## PROMISSORY NOTE—NOT NEGOTIABLE.

\$100 $\frac{00}{100}$ .

PROVIDENCE, R. I., Dec. 3, 1892.

*Ninety days after date, I promise to pay Mary A. Barton, One Hundred Dollars, value received, with use.*

SAMUEL R. WALKER.

## PROMISSORY NOTE—DEMAND.

\$250 $\frac{00}{100}$ .

SYRACUSE, N. Y., Sept. 22, 1892.

*On demand, I promise to pay The Central Trust Company, or order, Two Hundred Fifty Dollars, value received, with interest.*

JOHN W. HENDERSON,

E. J. HAYNES, Surety.

## JUDGMENT NOTE.

\$500 $\frac{00}{100}$ .

HARTFORD, CONN., Nov. 15, 1892.

Three months after date, I promise to pay Erastus Corning & Sons, or order, Five Hundred Dollars, value received, with interest at 5%.

And I do hereby confess judgment for the above sum, with interest and cost of suit, a release of all errors and waiver of all rights to inquisition and appeal, and to the benefit of all laws exempting real or personal property from levy and sale.

A. H. WOODWORTH.

## CHATTEL NOTE.

\$300 $\frac{00}{100}$ .

BIRMINGHAM, ALA., Aug. 25, 1892.

On or before Nov. 1, 1892, for value received, I promise to pay C. D. Lee, Three Hundred Dollars; to be paid said Lee at my warehouse by the delivery to him of wheat, corn, and oats, at current prices, One Hundred Dollars worth of each of the kinds of grain mentioned.

B. T. SHERMAN.

## PROMISSORY NOTE—INDORSED.

\$129 $\frac{87}{100}$ .

DENVER, COL., July 7, 1892.

Thirty days after date, I promise to pay C. E. Ruthven, or order, One Hundred Twenty-nine  $\frac{87}{100}$  Dollars, value received, at Third National Bank, Chicago.

W. H. MANCHESTER.

(Blank Indorsement.)

C. E. RUTHVEN.

(Full Indorsement by W. A. Parry, the holder.)

Pay to the order of J. E. Ward.

W. A. PARRY.

(Qualified Indorsement.)

Pay to the order of H. T. Wright,  
without recourse to me.

J. E. WARD.

(Restricted Indorsement.)

Pay to J. H. Cushman only.

H. T. WRIGHT.

(Waiver of Protest.)

For value received, I hereby waive demand, protest and notice of demand, and notice of non-payment on within note.

July 15, 1892.

H. T. WRIGHT.

## SIGHT DRAFT.

\$315 $\frac{43}{100}$ .

BROOKLYN, N. Y., Oct. 7, 1892.

*At sight pay to F. D. Livingstone, or order, Three Hundred Fifteen*  
 $\frac{43}{100}$  *Dollars, value received, and charge to the account of*

HENRY D. STONE.

To J. E. Knowles,  
*Antwerp, N. Y.*

## ACCOMMODATION NOTE—WITH INDORSEMENTS.

\$250 $\frac{00}{100}$ .

BALTIMORE, MD., Sept. 12, 1892.

*One month after date, I promise to pay to Myself, or order, Two*  
*Hundred Fifty Dollars, value received, at Merchants Bank.*

ADDISON PARKER.

Written across the back: *Addison Parker, Wm. Brown.*

## TIME DRAFT—ACCEPTED.

\$65 $\frac{88}{100}$ .

NEW HAVEN, CONN., Nov. 9, 1892.

*At ten days' sight, pay to B. J. Elliott, or order, Sixty-five*  
 $\frac{88}{100}$  *Dollars, value received, and charge to account of*

FREDERICK Q. EARL.

To S. D. Morse,  
*Springfield, Mass.*

Written across the face of the draft: *Accepted, Nov. 10, 1892, Pay-*  
*able at Fourth National Bank, S. D. MORSE.*

## CHECK—CERTIFIED.

No. 315.

BUFFALO, N. Y., Oct. 15, 1892.

NATIONAL EXCHANGE BANK  
OF BUFFALO.

Pay to Henry D. Huntington,-----or order,  
*Seven Hundred Ninety-two*  $\frac{35}{100}$  ----- *Dollars.* \$792 $\frac{35}{100}$ .

J. B. WASHINGTON.

Stamped or written across the face of the check: *Good, F. B. Allen,*  
*Teller.*

## GUARANTY OF PAYMENT.

*For value received, I hereby guarantee the payment of the within*  
*note.* W. B. WHEELER.

**GUARANTY OF COLLECTION.**

*For value received, I hereby guarantee the collection of the within note.*

S. R. CHAPIN.

**RECEIPT—TO APPLY ON ACCOUNT.**

MILWAUKEE, WIS., Oct. 17, 1892.

*Received of R. C. Spinning, One Hundred Fifteen Dollars to apply on account.*

\$115.00.

DUNCAN & FIELD.

**RECEIPT—IN FULL OF ALL DEMANDS.**

ATLANTA, GA., Nov. 14, 1892.

*Received of Wilson & Sprague, Seventy-seven  $\frac{45}{100}$  Dollars in full of all demands against them.*

\$77. $\frac{45}{100}$ .

ABRAHAM <sup>His</sup> × HINES.  
mark.

**RECEIPT—TO APPLY ON NOTE.**

BURLINGTON, VT., Sep. 22, 1892.

*Received of Armstrong & Brown, Two Hundred Twenty-five Dollars to apply on their note dated July 1, 1892, given to me, being the same payment which I have endorsed on said note.*

\$225.00.

W. B. SMITHFIELD.

**DUE BILL—PAYABLE IN MONEY.**

\$25.00.

CINCINNATI, O., Nov. 10, 1892.

*Due Amos R. Jennings, or order, Twenty-five Dollars.*

B. W. FRANKLIN.

**DUE BILL—PAYABLE IN GOODS.**

\$18 $\frac{40}{100}$ .

PATTERSON, N. J., Dec. 3, 1892.

*Due R. D. Sanderson, or bearer, Eighteen  $\frac{40}{100}$  Dollars in goods from my store.*

A. D. HAMILTON.

**SUBSCRIPTION PAPER.**

*We, the undersigned, hereby agree to pay the sums set opposite our respective names to O. C. French, for the purpose of building a parsonage for the Westminster Presbyterian Church Society of Salina, Kans.*

Alfred Wright	\$500	Robt. J. Moore,	\$200
		Corlis B. Gardner,	200

## ORDINARY FREIGHT RECEIPT.

New York, Albany &amp; Rochester Railroad Company.

SYRACUSE STATION, Jan. 4, 1893.

*Received from Sherwood & Co., in apparent good condition:*

MARKED.	DESCRIPTION OF PROPERTY.	WEIGHT.
<i>T. L. Jones,</i>	<i>25 bbls. Salt.</i>	<i>7500</i>
<i>Rochester,</i>		
<i>N. Y.</i>		

All Oils, Molasses or Syrup, Alcohols, Whiskey, Liquors or Fluids of any description, entirely at the Owner's Risk of Leakage; and all Machinery, Castings, Furniture, Wagons, Sleighs, and Toy Goods, at Owner's Risk of Chafing and Breakage.

Weight subject to correction.

As described above, contents and value unknown, to be transported by the NEW YORK, ALBANY & ROCHESTER RAILROAD COMPANY, over the line of this Railroad to their warehouse at *Rochester*, ready to be delivered at said warehouse, to the consignee or owner, and if the same are consigned to any point beyond the line of this Company's road ready to be delivered at said warehouse, to the next connecting Company or carrier, it being expressly agreed that said property is to be transported upon and in all respects subject to the regulations of the published Tariff of said Company, and to the conditions printed and endorsed hereon, which regulations and conditions form a part of this contract, and the acceptance of this contract is to be deemed evidence of notice of all such regulations and conditions to and of assent thereto by the shipper, consignee and owner of said property; and it being further expressly agreed that this Company assumes no liability, and is not to be held responsible as common carriers, for any loss of or injury to said property after its arrival at its warehouse aforesaid, or for any loss or damage thereto, or any delay in transportation or delivery thereof by any connecting or succeeding Company or carrier.

W. A. LUDOLPH, *Agent.*

DEPOSIT TICKET.

Commercial National Bank.

DEPOSITED BY

*Dodge & Brown Co.,**Rochester, N. Y., Oct. 29, 1892.*

	DOLLARS.	CENTS.
Bills, - - -	125	
Gold, - - -	50	
Silver, - - -	18	75
Check, - <i>Troy,</i>	39	15
	232	90

## RAILROAD BILL OF LADING.

# INTERNATIONAL TRANSPORTATION COMPANY.

## FREIGHT LINE.

☞ All articles entered on this Bill of Lading shall be subject to and governed by the Classification as published by Railroads, and to the rates properly belonging to such classification; and the rates as written in below, shall only apply to such Goods as are included in the class opposite or against which the rates are so written in.

**MARKS.**

W. J. SNELL,

Batavia,

N. Y.

*Subject to the order  
of Merchants Bank of  
Geneva, N. Y.*

Charges advanced, \$.....

**BILL OF LADING FROM**

Geneva, N. Y., to Batavia Depot.

If 1st Class, 15 cts. per 100 lbs.

If 2d Class, 13 cts. per 100 lbs.

If 3d Class, 10 cts. per 100 lbs.

If 4th Class, 8 cts. per 100 lbs.

If Special, .... cts. per 100 lbs.

Any consignment weighing less than 100 lbs. will be estimated and charged at 100 lbs.

**DEPOT:**

*Corner Court and Saint  
Paul Streets.*

GENEVA, N. Y., Jan. 6, 1893.

*Received from A. Carey & Co., in apparent good order [except as noted] the following PACKAGES [contents unknown], marked as in the margin, viz:*

10 bbls. Fish.

**(UNDER THE FOLLOWING CONDITIONS.)**

It being expressly understood and agreed that in consideration of issuing this through Bill of Lading, and guaranteeing a through rate, the International Transportation Company reserves the right to forward said goods by any Railroad line between point of shipment and destination. The International Transportation Company, or carriers over whose line they are transported, shall only be responsible as warehousemen, not as common carriers, while the goods are at any of their stations awaiting delivery to the consignees. They will not be liable for any injury to any articles of freight during the course of transportation, occasioned by the weather, accidental delays, or natural tendency to decay, nor from any loss arising from leakage, improper packing, insufficient coo- perage or strapping; nor for any loss or damage on any article or property whatever, by fire, or other casualty, while in transit or while in depots or places of transshipment, or at depots or landings at point of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on seas, rivers, lakes, or canals. No responsibility will be assumed for damage resulting from chafing of goods packed in bales. All necessary coo- perage and bailing to be at owners' risk.

No guarantee of special time for delivery of the goods is given—Carriages and Sleighs, Eggs, Furniture, Looking Glasses, Glass and Crockery Ware, Acids, Machinery, Stoves and Castings, Wrought Marble, Musical Instruments, Liquor put up in glass or earthen ware, and all other frail and brittle articles, Fruit and all other perishable goods—will only be taken at the owners' risk of fracture or injury during the course of transportation, loading and unloading, unless specially agreed in writing to the contrary. Gunpowder, Friction Matches, and like combustibles and explosives, will not be received except by special agreement, and all persons procuring the reception of such freight without the knowledge of the carrier will be held responsible for any damage which may arise from it. In the event of the loss of any property for which responsibility attaches under this Bill of Lading to the carrier, the value or cost of the same, at the time and point of shipment is to govern the settlement for the same, except the value of the articles has been agreed upon with the shipper, or is determined by the classification upon which the rates are based, and said carrier shall have the benefit of any insurance effected by or on account of the owner of such goods. It is further stipulated and agreed that, in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that Company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening thereof. No claim will be allowed for deficiency or damage on packages if receipted for in "good order" at the point to which they are contracted by this bill. No claim will be allowed that arises from insufficient packing or incorrect or inadequate marking. The acceptance of this Bill of Lading or receipt for goods, made subject to the conditions of this Bill of Lading, makes this an agreement between the International Transportation Company and carriers engaged in transporting said goods and all parties interested in the property. In witness whereof, the agent affirms to 2 Bills of Lading, all of this tenor and date, one of which being accomplished the other to stand void.

D. BANNING, Agent.

REMARK.—Our great railroad systems have incorporated the provisions of their inland Freight Bills and Bills of Lading with those of ocean transit and the Bill of Exchange, calling the new form a Foreign Bill of Lading. By its provisions as a contract, goods may be shipped to seaboard and thence to any foreign port at a flat price named at the point of departure and payable either there or at the point of destination. Thus all extra charges, frequent by old time methods, are avoided, and the shipper here uses this foreign Bill of Lading in its exchange character as he would use any foreign Bill of Exchange, by transferring it to any other person, or by negotiating it at a bank.

## DRAFT TO ACCOMPANY BILL OF LADING.

\$95.00.	Geneva, N. Y., Jan 6, 1893.
At sight,	Pay to the Order of
Cashier, Merchants Bank of Geneva, N. Y.,	
Ninety-five	Dollars,
Value received, and charge same to account of	
No. 35. To W. J. Smith.	A. Cary & Co.
Baltimore, N. Y.	

REMARK.—When goods are ordered to be shipped by freight, C. O. D., the custom is to have the collection made by a bank. The goods are marked with the name and address of the consignee, subject to the order of the bank by which the collection is to be made. The shipper then procures a Bill of Lading, and having drawn a draft on the consignee favor of the bank, for the amount of the goods, attaches it to the Bill of Lading and either deposits it in the bank or leaves it there for collection. Or he may send it for collection to some bank located in the same city as the consignee.

## FREIGHT BILL AND FREIGHT RECEIPT.

No. 1487.

BUFFALO, Dec. 24, 1892.

D. G. TRUE &amp; Co.,

To The New York Central and Hudson River Railroad Company, Dr.

No payment of this Bill will be valid unless made to the Freight Agent at this Station, or to some person authorized by him to receive payment thereof.

For Transportation from Albany to Buffalo.

One box Leather,		4	50
Door 14,			
No. Car, 3742.	Received Payment,	Back Charges	2 10
	W. E. BROWN, Freight Agent.	\$	6 60

N. B.—Payment will be required on delivery of all goods.

No. 1487.

BUFFALO, Dec. 24, 1892.

**Received,** Dec. 24, 1892, from The New York Central & Hudson River R. R. Company the following packages in good order, Marked: D. G. TRUE & Co., Buffalo, N. Y.,

One box Leather.

Door 14.

Charges, \$6.60.

No. Car, 3742.

D. G. TRUE &amp; CO.

## EXPRESS C. O. D. ENVELOPE.

(22)

No. ....

## COMMERCIAL EXPRESS COMPANY.

\$ 31.75 ..... for Collection.

\$ ..... Charges for Return of Money.

\$ ..... Total Amount to be Returned.

From *O. B. Henderson Chemical Co.,*  
*593 S. Washington St.,*  
*Minneapolis, Minn.*

On *Williamson & Redman,*  
*Binghampton, N. Y.*

Minneapolis, Minn., *Jan. 6, 1895.*

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C. O. D.

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## Bill to be Collected on Delivery of Goods.

☒ Return proceeds in this Envelope, CAREFULLY SEALED, without delay.

Do not deliver the whole or any part of the goods accompanying this bill until you receive pay therefor; and be careful to notice what money you receive, and, as far as practicable, send the same as received, and follow the special instructions of the shippers, if any are given on the bills. If goods are refused, or the parties cannot be found, notify the office from whence received, with names and dates, and await further instructions

Never forward C. O. D. packages beyond destination without direct orders from the Shipper, through Shipping Office, or until the collection and charges are paid.

N. B.—In cases where the bills do not accompany goods marked C. O. D., retain package and write to the office shipping the goods.

☒ Agents must comply with the above instructions in every instance.

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## REMARKS.

*Add return charges.*

## CIRCULAR LETTER OF CREDIT.

No. 3987.

ADDRESSED TO THE CORRESPONDENTS OF

KNAUTH, NACHOD &amp; KUHNE.

£500.

*New York, March 1, 1893.**Gentlemen.*

We beg to introduce and to commend to your kind attention Mr. John H. Andrews, to whom you will please furnish such funds as he may require up to the aggregate amount of Five Hundred Pounds Sterling against his Sight Drafts on The Alliance Bank, limited, London, each draft to be plainly marked as "drawn under K., N. & K's L<sup>1</sup> Credit, No. 3987."

We engage that such drafts shall meet with due honor in London, if negotiated within Six months from this date, and request you to buy them at the rate at which you purchase demand drafts on London, deducting your charges, if any.

The amount of each draft must be inscribed on the back of this letter, and to this use we wish to call your special attention, the letter itself should be attached to the last draft drawn.

Please see to it that the drafts be signed in your presence, and carefully compare the signature with the one below.

We are, Gentlemen,

*Your obedient servants,*

(Signed)

KNAUTH, NACHOD & KUHNE.

Holder's Signature.

*John H. Andrews.*

REMARK.—Letters of Credit are usually on double folded sheets, on both inside pages of which appear blanks as given below.



**APPRENTICESHIP AGREEMENT—GENERAL FORM.**

*This Agreement Witnesseth that Chester A. Gould, now fifteen years of age, and with the consent of his father, Seth H. Gould, does by these presents apprentice himself to Martin D. Spencer, engraver, all parties of Cleveland, Ohio, to learn the art of engraving, from the date hereof unto the fifteenth day of September, 1894.*

*That he will perform all the duties required by law of him, and otherwise conduct and demean himself as a conscientious, faithful and industrious apprentice ought.*

*That in consideration thereof, said Martin D. Spencer does hereby covenant, promise and agree to use the utmost of his endeavors to have said apprentice taught the art of engraving aforesaid, and to have in the public schools six months' instruction in the common branches per year, and in the meantime provide said apprentice with all necessities, including food, lodging, clothing, laundry and medical attendance, and at the expiration of said term to give him two hundred dollars in cash.*

*In witness whereof, said parties have hereunto subscribed their names this fifteenth day of September, 1888.*

*Signed,*

CHESTER A. GOULD,  
SETH H. GOULD,  
MARTIN D. SPENCER.

**APPRENTICESHIP RELEASE.**

*Know All Men by These Presents, that Chester A. Gould, son of Seth H. Gould, did by his agreement, bearing date September 15th, 1888, bind himself as an apprentice unto Martin D. Spencer, of Cleveland, Ohio, for a term of six years from date thereof, as by said agreement more fully appears.*

*That the said Chester A. Gould has since become partially blind, and thus is unable to accomplish the object of his agreement.*

*That by reason thereof, said Martin D. Spencer does hereby release and forever discharge said Chester A. Gould, and his father, Seth H. Gould, of and from said agreement, and all service and all other agreements, covenants, matters and things therein contained, on their or either of their parts to be observed and performed, whatsoever, to date hereof.*

*In witness whereof, I have hereunto set my hand this twelfth day of April, 1892.*

MARTIN D. SPENCER.

## SUBMISSION TO ARBITRATION.

*Know All Men by These Presents, That whereas a controversy is now existing between Philo Smith, Sr., and Joseph Snyder, both of the City of Elmira, N. Y., touching an alleged indebtedness of the latter to the former for services rendered.*

*Now, therefore, we, the said Philo Smith, Sr., and Joseph Snyder, do hereby submit the said controversy to the decision and arbitration of David Decker, of the City of Elmira aforesaid; and we do covenant each with the other that we will in all things faithfully keep, observe, and abide by the decision and award that he, the said David Decker, may make in writing, in the premises, under his hand, ready to be delivered on or before March 15th 1893.*

*And it is Further Agreed, by the parties hereto, that the party that shall fail to keep, abide by and observe the decision and award to be made according to the foregoing submission, shall pay to the other the sum of fifty dollars, as fixed liquidated damages, and not as a penalty.*

*Executed mutually by the parties to this submission this first day of March, 1893.*

*In presence of DONALD KENNEDY.*

PHILO SMITH, SR. [SEAL.]

JOSEPH SNYDER. [SEAL.]

## AWARD OF ARBITRATOR.

*To All to Whom These Presents May Come, I, David Decker, to whose arbitration and award was submitted the matters in controversy existing between Philo Smith, Sr., and Joseph Snyder, of the City of Elmira, N. Y., as appears more fully in their written submission, bearing date the first day of March, 1893. Now, therefore, know ye that I, having been first duly sworn according to law, and having heard the proofs and allegations of the parties, and examined the matters in controversy by them submitted, do make, publish and declare this my award in writing; that is to say, I find Philo Smith, Sr., is indebted to Joseph Snyder in the just and full sum of two hundred and ten dollars. And I direct and award that Philo Smith, Sr., within one month after service upon him of the notice of this award, pay to the said Joseph Snyder the said sum of two hundred and ten dollars, together with the costs of this arbitration.*

*In Witness Whereof, I have hereunto subscribed these presents this twelfth day of March, 1893.*

*In presence of JOEL SISSON.*

DAVID DECKER. [SEAL.]

**LAND CONTRACT.**

*This Agreement made and entered into at Dunkirk, N. Y., this fifth day of December, 1892, provides as follows:*

*That in consideration of the sum of two thousand (2000) dollars—to be paid as hereinafter specified—John Brown, of the city of Dunkirk, N. Y., agrees to convey by full warranty deed to Norman C. Stull, of the city of Buffalo, N. Y., the twenty acre tract of land lying four miles west of the city limits of Dunkirk, and known as the hop yard, and described as being the southwest one-fourth of the Stephens tract, as by map of said tract on file in the office of the clerk of Chautauqua county.*

*It is further provided that the land described shall be conveyed as agreed on or before Jan. 3, 1893, and that said Stull shall, on receiving from said Brown the deed of conveyance as mentioned, together with a full and complete abstract of title to date of conveyance of said land, pay to said Brown the purchase price in full.*

*This contract shall be binding upon the parties hereto, their heirs, executors, administrators and assigns.*

Witness,

(Signed,)

RICHARD PECK.

JOHN BROWN,  
NORMAN C. STULL.

**EMPLOYMENT CONTRACT.**

*This Agreement made and entered into at Richland, Wisconsin, this twentieth day of February, 1893, by and between Jerome B. Green, farmer, and Clayton Hopkins, laborer, both of Richland, Wis., provides as follows:*

*First.—That said Hopkins shall work as a farm hand on the premises of said Green, and as directed, in the usual manner, and for the usual hours accustomed in farm business, for the period of one year from date hereof.*

*Second.—For the services provided for, said Green agrees that during said year the said Hopkins may become as one of said Green's family, boarding and lodging therewith, and having all the usual privileges of farm laborers, and at the completion of the year's labor Green shall pay to Hopkins the sum of two hundred and forty (240) dollars in full for his services.*

*Third.—Neither party hereto shall have a right to terminate this contract before the expiration of the time, except for cause.*

Witness,

(Signed,)

LOUIS H. BARNES.

JEROME B. GREEN,  
CLAYTON HOPKINS.

## PROOF OF CLAIM.

State of New York, }  
COUNTY OF GENESEE. } ss.

John G. Cobb, being duly sworn, says that (the estate of Asa B. C. Dickinson, deceased), or (the assigned estate of George Clawson), is justly indebted to deponent, in the sum of one hundred dollars and interest thereon from the 10th day of May, 1892, as specified in the annexed account [or as appears from the note of which the annexed is a copy].

That the said sum of one hundred dollars and interest is now justly due and owing to deponent; that no payment has been made thereon; that there are no offsets thereto; and that the same is not secured by judgment or otherwise.

Sworn to and subscribed before me this }  
23d day of December, 1892. }

JOHN G. COBB.

SELMA D. HOLTON,  
Notary Public.

## BUILDING CONTRACT.

Agreement made this twentieth day of February, 1893, between Walter N. Clark, of Batavia, N. Y., of the first part, and Theodore C. Spencer, builder, of the same place, of the second part, the said party of the second part covenants to and with the said party of the first part, to make, erect, build, and finish in a good, substantial and workmanlike manner, on the lot belonging to the party of the first part, and known as No. 4 Bank st., in said village of Batavia, one frame house, agreeably to the plans and specifications made by A. J. Warner, architect, hereto annexed, of good and substantial materials, by the first day of July next, and the said party of the first part covenants and agrees to pay to the said party of the second part the sum of five thousand dollars lawful money, in manner following: two thousand dollars at the beginning of said work; two thousand dollars more when said house shall have been completely roofed, and one thousand dollars more in full for said work when the same shall be completely finished.

And for the true and faithful performance of each and all of the covenants and agreements above mentioned, the parties to these presents bind themselves, each unto the other, in the penal sum of one thousand dollars, as liquidated damages, to be paid by the failing party.

In Witness Whereof, We have hereunto signed our names and affixed our seals on the day and year first above written.

Witness, (Signed,)  
ARCHIBALD DIXON.

WALTER N. CLARK [SEAL.]  
THEODORE C. SPENCER [SEAL.]

## ABSTRACT OF TITLE.

*Examination of Title*  
to

*part of section No. 35, Township No. 32 S., Range No. 27 E., State of  
Florida.*

1.

*The United States of America*  
to  
*Hamilton Disston.*

*Land Patent Certificate No.*  
*10715.*  
*Dated, March 30, 1875.*  
*Consideration \$10,000.00.*  
*Recorded, April 20, 1875, in book*  
*J of deeds, at page 35.*

*Conveys said section 35, with other property.*

2.

*Hamilton Disston and wife*  
to  
*The Florida Land and Improvement*  
*Company.*

*Quit Claim deed.*  
*Dated May 2, 1880.*  
*Consideration \$5,000.00.*  
*Recorded, May 20, 1880, in book*  
*K of deeds, at page 53.*

*Conveys said section 35, with other property.*

3.

*The Florida Land and Improvement*  
*Company*  
to  
*Arthur G. Clement.*

*Warranty deed.*  
*Dated, April 1, 1885.*  
*Consideration \$500.00.*  
*Recorded, April 10, 1885, in book*  
*K of deeds, at page 351.*

*Conveys the N. W. quarter of the S. W. quarter of said section 35, containing 40 acres according to the government survey.*

*I, Geo. W. Hendry, Clerk of the Circuit Court, in and for the County of DeSoto, State of Florida, hereby certify that I have carefully examined the records in my office, and I find nothing of record affecting the title of the premises described in No. 3, in the foregoing abstract, from and including March 30, 1875, in the names of Hamilton Disston, The Florida Land and Improvement Co., and Arthur G. Clement, other than is set forth in the foregoing three abstracts, and I further certify that I find no judgments, mortgages or liens, or incumbrances, from and including said date, against said persons and premises, excepting as is hereinbefore set forth, to and including this date.*

*Dated, June 1, 1892.*

[SEAL.]

GEO. W. HENDRY,  
*Clerk of the Circuit Court.*

## AFFIDAVIT.

State of New York, }  
 COUNTY OF LIVINGSTON. } ss.

*Augustus Hamilton, being duly sworn (or affirmed in case the affiant objects to taking an oath), according to law, says that on the twenty-first day of June, 1892, Calvin Perkins, the defendant, worked the entire day, laying brick for him, the said Hamilton, on his premises in Livonia, County aforesaid.*

*Sworn to and subscribed before me this } AUGUSTUS HAMILTON.  
 thirtieth day of June, 1892.*

HENRY D. KINGSBURY,  
*Justice of the Peace.*

## RELEASE.

*I, Samuel Rogers, Jr., of Waverly, Coffey County, Kansas, for and in consideration of the sum of three hundred (300) dollars, the receipt of which is hereby acknowledged, do hereby release and forever discharge Ralph Holden, of Topeka, Kansas, his heirs, executors and administrators, of, and from all actions, causes of action, suits, claims and demands whatsoever to this date.*

*In Witness Whereof, I have hereunto signed my name this fourteenth day of February, 1893.*

Witness, SAMUEL ROGERS, JR. [SEAL.]

EDWIN TUCKER.

## OATH OF OFFICE—APPOINTIVE OR ELECTIVE.

*I do solemnly swear (or affirm) that I will support the constitution of the United States, and of the State of ———, and that I will faithfully perform the duties of the office of ———, according to the best of my ability.*

Elected officers take the above, and with it the following:

*And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered, or promised to pay, contributed, or offered, or promised to contribute any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and I have not made any promise to influence the giving or withholding any such vote.*

## WILL.

*In the Name of God, Amen.* I, John M. Williams, of the City of Oneida, State of New York, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish and declare this to be my last Will and Testament, that is to say:

*First.*—After all my lawful debts are paid and discharged, I give and bequeath to my wife, Florence M. Williams, in lieu of her dower interests in my estate, the property in the City of Rome, N. Y., known as the Arlington Hotel, together with the barns and grounds adjoining, and all appurtenances connected therewith.

*Second.*—To my son, Charles S., I give seventy-one shares of the capital stock of the Oneida Fruit Preserving Company, which now stand in my name on the books of said company; also one thousand dollars in cash.

*Third.*—To my son, Walter L., I give the farm known as the Pearl Creek Place, together with all the crops, stock and utensils which may be thereon at the time of my death.

*Fourth.*—To my daughter, Mabel E., to whom I gave five thousand dollars January 6, 1889, at the time of her marriage, I now give and bequeath only my family carriage and carriage team, together with the harness, robes and whip therewith belonging.

*Fifth.*—To my daughter, Grace B., the wife of John D. Conkling, I give and bequeath only my gold watch and chain, hereby intending to discriminate against her because of her having married contrary to my expressed wishes.

*Sixth.*—To my sons, Charles S. and Walter L., as trustees, I hereby give and bequeath the ten thousand dollars of U. S. Government bonds now owned by me, the provisions of the trust hereby established being:

1. That the income from said bonds as it shall be collected is to applied solely to the education of the children of my said daughter, Grace B., the wife of John D. Conkling; and,
2. It is further provided that at the maturity and payment of the said bonds, the principal thereof shall by the trustees herein named be reinvested in income bearing bonds approved by the Surrogate of Oneida County; and,
3. When the youngest of the children of my said daughter, Grace B., shall become of age, the trustees herein named shall sell in the open market such bonds as they then hold as trustees and divide the proceeds of such sale among the children of my said daughter, Grace B., share and share alike.

*Seventh.*—*I hereby give and bequeath my law library, with all pamphlets and notes in manuscript found therewith, to the Law Library of Cornell University, at Ithaca, New York.*

*Eighth.*—*All the residue of my property, both personal and real, I give and bequeath to my beloved wife, Florence M. Williams, in addition to the estate hereinbefore mentioned as bequeathed to her, and intend hereby to name and constitute my said wife my residuary legatee.*

*Likewise, I make, constitute and appoint my wife and my son, Charles S., to be co-executors of this my last Will and Testament, hereby revoking all former Wills by me made.*

**In Witness Whereof,** *I have hereunto subscribed my name and affixed my seal, the seventh day of February, in the year of our Lord one thousand eight hundred and ninety-two.*

JOHN M. WILLIAMS. [SEAL.]

*The above written instrument was subscribed by the said John M. Williams in our presence, and acknowledged by him to each of us; and he at the same time declared the above instrument, so subscribed, to be his last Will and Testament; and we, at his request, have signed our names as witnesses hereto, in his presence and in the presence of each other, and written opposite our names our respective places of residence.*

GEORGE G. FLEMING, 30 Clinton St., Oneida, N. Y.

MARY T. BLY, 63 Knox St., Oneida, N. Y.

ROBERT S. WILLIS, 299 West Ave., Rochester, N. Y.

#### CODICIL TO THE FOREGOING WILL.

*Whereas, I, John M. Williams, did on the seventh day of February, 1892, make my Last Will and Testament, I do now, being of sound mind and memory, add this codicil to my said Will and to be taken as a part thereof:*

*First.*—*I hereby ratify and confirm my said Last Will and Testament in every respect, save so far as any part of it is inconsistent with or expressly revoked by this codicil.*

*Second.*—*Section second of my said Will is hereby changed by revoking that clause thereof which provided for a bequest of one thousand dollars to my son, Charles S.; and I now hereby give and bequeath one thousand dollars to my daughter, Grace B. Conkling, to be used by her independent of control from her husband.*

*Third.*—*I do give and bequeath to the trustees of the Central Presbyterian Church Society of Rochester, N. Y., to be used for the establishment*

*and maintenance of missions, the six thousand dollars that since the execution of my said Last Will and Testament I have inherited from the estate of my deceased brother, Roger.*

*In Witness Whereof, I hereto affix my seal and signature this first day of May, in the year of our Lord one thousand eight hundred and ninety-two, and declare this to be a codicil to my said Will and amendatory thereof.*

JOHN M. WILLIAMS. [SEAL.]

*The above written instrument was subscribed by the said John M. Williams in our presence, and acknowledged by him to each of us; and he at the same time declared the above instrument, so subscribed, to be a codicil to his Last Will and Testament; and we, at his request, have signed our names as witnesses hereto, in his presence and in the presence of each other, and written opposite our names our respective places of residence.*

WILLIAM H. PECK, Cazenovia, N. Y.

SARAH J. BROWN, 69 Seneca St., Oneida, N. Y.

WALTER A. BROWNELL, 125 University Ave., Syracuse, N. Y.

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